TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 431

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH, AND MARY ANN LEECH, HIS WIFE, ET AL., PLAINTIFFS IN ERROR,

vs.

THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY AND THE PENNSYLVANIA COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED FEBRUARY 4, 1896.

(16,175.)

(16,175.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 885.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH, AND MARY ANN LEECH, HIS WIFE, ET AL., PLAINTIFFS IN ERROR,

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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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1 In the United States Circuit Court of Appeals for the Third Circuit.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH, and Mary Ann Leech, His Wife, in Right of said Wife; Edward P. Clarke, George Hepburn Watson and Anne Townsend Watson, His Wife, in Right of said Wife, and Carver Worthington Barber, Respectively Citizens of the States of Missouri, Ohio, New Jersey, and Minnesota, Plaintiffs in Error (Plaintiffs Below),

versus

THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY and The Pennsylvania Company, Lessee, Both Corporations and Citizens of the State of Pennsylvania, Defendants in Error (Defendants Below).

In error to the circuit court of the United States for the western district of Pennsylvania.

Coram Dallas, circuit judge, and Butler and Wales, district judges.

This was an action of ejectment and comes before this court on a writ of error to the United States circuit court for the western district of Pennsylvania, which entered judgment for the defendants.

First. The parties to the action both claimed title to the land in controversy under the will of James S. Stevenson, deceased, dated March 11, 1831, which is in the words following, to wit:

"I, James S. Stevenson, of the city of Pittsburgh, in the State of Pennsylvania, aged fifty years on the 12th day of January, 1831, reflecting on the certainty of death and desirous of making a distribution of my property in the event of my decease, do
2 hereby declare this writing to be my last will and testament, made this twelfth day of March, in the year of our Lord, one thousand eight hundred and thirty-one.

"I give and bequeath to Amanda Stephens, daughter of Margaret Stephens lots 67, 68, 69 and 70, in the city of Pittsburg, in their full extent, bounded by Penn street, Wayne street, the Allegheny river, and by lot 71. Said Amanda Stephens is now five years old (born April 7, 1826.)

"—— Stephens and ——, his wife, the parents of Amanda's mother, live near Connellsville, in Fayette county, Pennsylvania.

"In the event of Amanda dying unmarried, or if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Penna.

"I give and bequeath to John Barber, of Columbia, and to his heirs the lots in the city of Pittsburgh numbered 71 and 72, bounded by Penn street, by lot 70, by the Allegheny river and by lot 73.

"I give and bequeath to Mary Livingston's children the lot 74, in the city of Pittsburgh. And to her unmarried sister, Eliza

Stevenson, I give and bequeath the lot 73, in the city of Pittsburgh. and in the event of her death the lot to go to her sister's children, Mary Livingston and Eliza Stevenson are daughters of the late Colonel S. Stevenson, son of Robert Stevenson, of York county, Pa.

"I give and bequeath to the sons of James Stevenson, formerly of York county, but who died in Lycoming county in 1810 or 1811, the brick and other buildings with the ground on which they are erected situated at the corner of Wood and Fifth streets, Pitts-
3 burgh. These sons are Stephen, Manning, Ruben, Samuel and I. Stephenson.

"All the remainder of my property to be sold and after paying my debts to be divided into sixteen shares and to be disposed of as follows: To Amanda Stephens one share, to Mary Livingston, one share, to Eliza Stevenson one share, to Stephen Stevenson, within named, one share, to James Wright, of Columbia, or his heirs two shares, to John Barber, of Columbia, two shares, to Ann Elliott, formerly Ann West, now wife of Rev. Mr. Elliott, of Washington county, one share, to Jane E. Thecker, niece of the late Rev. Mr. Kerr, one-sixteenth (or one share), to the heirs of John Barber, of Columbia, two shares, to the heirs of James Wright, of Columbia, two shares, to Charles Avery, J. M. Snowden and John Thaw, to be divided equally, two shares.

"I hereby constitute and appoint the said Charles Avery, J. M. Snowden and John Thaw and John Barber the executors of this my will.

"Signed at Pittsburgh this 11th day of March, 1831.

"JAS. S. STEVENSON.

"Witness:
"GEO. OGDEN.
"J. S. CRAFT."

Second. That on the 16th day of October, 1831, when confined to his room by sickness, the testator first published his will in the presence of witnesses whom he called to attest it, and a few hours thereafter died, and this will, on the 18th of October, 1831, was duly probated.

Third. That the said Amanda Stevens, then a child of five years of age, survived the testator and in 1847 intermarried with Samuel Haight; that in 1848 she and her husband executed a deed
4 intended to bar a supposed estate tail in the land covered by the devise, which, upon the assumption that she had taken an estate tail, would have been sufficient for that purpose; that she had children by her said husband who, as well as her husband, died in her lifetime, and that she died September 21, 1891.

Fourth. That at the date of the death of the testator John Barber was alive, married, and had children, some of whom are plaintiffs in this action.

Fifth. That on March 20th, 1893, S. Duffield Mitchell, adm'r *d. b. n. c. t. a.* of James S. Stevenson, deceased, brought an action of ejectment against these defendants in the court of common pleas in and for Allegheny county, Penna., to recover the land here in con-

troversy, in which action a verdict was rendered under the direction of the court for the defendants, on which judgment was entered accordingly; that on writ of error to the supreme court of the State this judgment was affirmed.

Sixth. That on the 2nd day of February, 1895, a second action of ejectment for the same land was brought by the plaintiffs in this suit in the circuit court of the United States for the western district of Pennsylvania, in which a verdict under the direction of the court was rendered for the defendants, on which judgment was entered accordingly; to which judgment a writ of error was sued out from the circuit court of appeals of the third circuit, being the writ of error upon which the questions now to be submitted have arisen.

The said court of appeals, desiring the instruction of the Supreme Court of the United States for its proper decision of the following questions or propositions of law, respectfully certifies the same:

5 First. Is the decision of the supreme court of Pennsylvania before referred to conclusive? If not, then,

Second. What estate did Amanda Stevens take under the devise?

In testimony whereof the undersigned judges, holding the said court of appeals, have hereunto set their hands and seals this thirty-first day of December, A. D. 1895.

GEO. M. DALLAS, *Cir. Judge.* [SEAL.]
WM. BUTLER, *D. J.* [SEAL.]
LEONARD E. WALES, *D. J.* [SEAL.]

6 In the United States Circuit Court of Appeals for the Third Circuit, September Term, 1895.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH, and Mary Ann Leech, His Wife, in Right of said Wife; Edward P. Clarke, George Hepburn Watson and Anne Townsend Watson, His Wife, in Right of said Wife, and Carver Worthington Barber, Respectively Citizens of the States of Missouri, Ohio, New Jersey, and Minnesota, Plaintiffs in Error (Plaintiffs Below),

versus

THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY Company and The Pennsylvania Company, Lessee, Both Corporations and Citizens of the State of Pennsylvania, Defendants in Error (Defendants Below).

No. 35.

In error to the circuit court of the United States for the western district of Pennsylvania.

Coram Dallas, circuit judge, and Butler and Wales, district judges.

7 To Hon. George M. Dallas, circuit judge; Hon. William Butler, district judge, and Hon. Leonard E. Wales, district judge, holding said court:

The parties plaintiff and defendant most respectfully suggest to your honorable court that, under the rulings of the Supreme Court of the United States, it seems that the latter court will not look out-

side of the certificate in determining the questions certified, and that the certificate as filed does not contain all the facts necessary to enable the Supreme Court fully to answer the questions certified.

That the certificate should be changed as follows:

First. Make paragraph second of said certificate read as follows:

That on the 16th day of October, 1831, when confined to his room by sickness, and after a dangerous illness for two weeks preceding his death, the testator, though he had theretofore signed his will, first published the same in the presence of witnesses whom he called to attest it, and a few hours thereafter died, and this will, on the 18th of October, 1831, was duly probated, which facts as to the time and circumstances of publication were not found by the special verdict on which judgment was entered in the ejectment suit in the State courts of Pennsylvania.

Second. Make paragraph third of said certificate read as follows:

That the said Amanda Stephens, then a child of five years of age, survived the testator, and in 1847 intermarried with Samuel Haight; that in 1848 she and her husband executed a deed intended to bar a supposed estate tail in the land covered by the devise, which, upon the assumption that she had taken an estate tail, would have been sufficient for that purpose; that she had children by her said husband who, as well as her husband, died in her lifetime, and that she died, never having married again, on September 21, 1891, but she and her husband in their lifetime, and after said steps to bar the entail, conveyed in fee simple to the defendants and others the property here in dispute.

8 Third. Add to the fifth paragraph of said certificate the text of the opinion of Judge Ewing, of the court of common pleas No. 2 in and for Allegheny county, in the case of Mitchell, administrator, *versus* defendants, as follows:

"*Opinion by Ewing, P. J.*

This case has been ably and exhaustively argued on both sides. The question of law arises on the construction of the will of James S. Stevenson, who died October 16, 1831, aged 51 years, having a few hours before his death made his last will, dated, however, March 12, 1831, written by himself. The original will is without punctuation. The facts as to its execution appear from the probate endorsed on the will.

The Will.

'I, James S. Stevenson, of the city of Pittsburgh, in the State of Pennsylvania, aged fifty years, on the 12th day of January, 1831, reflecting on the certainty of death and desirous of making a distribution of my property in the event of my decease, do hereby declare this writing to be my last will and testament made this 12th day of March, in the year of our Lord one thousand eight hundred and thirty-one.

I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69 and 70, in the city of Pittsburgh in their

full extent, bounded &c. (Description includes the property in suit in this case.)

Said Amanda Stephens is now five years old (born April 7, 1826). —— Stephens and —— his wife, the parents of Amanda's mother, live near Connellsville, Fayette Co., Penna.

In the event of Amanda dying unmarried, or if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber of Columbia, Penna.'

John Barber, of Columbia, Pa., was named as one of the executors.

The will proceeds thereafter to make other devises and bequests specifically, and contains a provision that all his remaining property shall be sold and the proceeds divided amongst legatees named.

The special verdict finds that Amanda Stephens married Samuel Haight and had offspring by her husband, five children, one of whom married, but all of whom died before their mother, without leaving offspring; that Samuel Haight died before his wife Amanda, who died September 28th, 1891.

9 Also, that if the will created an estate tail in Amanda Stephens, the entail was duly barred by deed dated July 27, 1848, and proceedings thereon, and that by sundry mesne conveyances the title of Amanda Stephens, freed from entail, became vested in the defendants.

The testator evidently intended to dispose of all his property. The devise to Amanda Stephens, followed by the limitations over or without them, created a fee, whether in tail or contingent. The circumstances, the age of the devisee, and the will leave us in no doubt that the contingency of Amanda's death did not mean her death before the testator.

What is the true and legal meaning of the words 'dying without offspring by her husband'? Legally, if not defined by other parts of the will, we take offspring to mean descendants, however remote. Thompson *vs.* Beasley, 3 Drew., 7; Young *vs.* Davies, 2 Dr. & Sm., 167; Allen *vs.* Markell, 36 Pa., 117.

Webster defines it 'that which is produced, especially a child or children; descendants, however remote from the stock.' The Century Dictionary says, 'Progeny; descendants, however remote from the stock; issue; a collective term applied to several or all descendants.'

True, it may be confined to children, as in Lister *vs.* Tidd, Bevans' Report, vol. 29, page 618, in a division of money at death of widow. In the present case we interpret the phrase 'dying without offspring by her husband' to have the same legal effect and force as the words 'dying without legitimate issue' or 'heirs of her body.' They are words of limitation, not of purchase.

Does the will of James S. Stevenson refer to a definite or an indefinite failure of issue or offspring of Amanda Stephens?

To undertake to cite and still more to reconcile the numberous

decisions on this general question would not only be confusing and interminable, but to any clear-headed lawyer it is impossible. The decisions are irreconcilable.

But there are general rules well established which govern this case. That the words 'dying without issue' or 'without legitimate issue,' standing alone and uncontrolled by other parts of the will, 'import an indefinite failure of issue is well established, and in all the departures from fundamental rules' it has not been shaken in this State, Eichelberger *vs.* Barnitz, 9 Watts, 447, being the leading case, affirmed in Middleswarth *vs.* Blackmore, 74 Pa., 414, and in all subsequent cases when the question has been raised. *Prima facie*, then, on the settled rule of interpretation, this phrase in the will imports an indefinite failure of issue.

Another canon of interpretation is properly invoked by the plaintiff, to wit, that the intention of the testator must govern, and if from reading the whole will it is apparent that the testator meant, and has potentially said, that the devise over is to take effect in case the first taker dies leaving no issue living at the time of her death, it is a definite failure of issue.

Middleswarth's Administrator *vs.* Blackmore, 74 Pa., 414, was a case of this kind, where each of several provisions of the will pointed distinctly to a distribution at the death of Jonathan without issue living at his death, and all these provisions taken together showed clearly and conclusively that that was the intention of the testator.

Is this such a will? Counsel for plaintiffs have made a very ingenious argument in the affirmative, and, while the case is not free from doubt, they have failed to convince us that the intention of the testator was different from the ordinary legal import of the terms used in the devise.

The arguments mainly are that it must be presumed that he intended the event to occur, if at all, in the lifetime of his executors named, who would then sell the property and divide the proceeds; also that testator in the devise uses the words 'in the event of' Amanda dying, &c., and that he uses these words in the preamble of his will, 'in the event of my dying,' and in the second paragraph of the will, in the event of her (Eliza Stevenson) death. In these two other cases referring to what is to be done immediately upon the death; that he, in declaring what was to be done in the contingency of Amanda's death, must have intended at and immediately after her death. It may be he did so intend, but we start with the presumption, the legal rule of interpretation, against it, and in our opinion it is not overcome by the other clauses.

The legatees of the proceeds of the property if sold were not necessarily in being or known to testator; it is to the heirs of John Barber; the same words he uses in another part of the will, 'John Barber and his heirs,' evidently in the latter not meaning children.

If an indefinite failure of issue was intended, the fact as to Amanda having had offspring or her having survived them is immaterial.

We are of the opinion that the will of James S. Stevenson devised

an estate tail in the property in question to Amanda Stephens, which, having been duly barred and the title conveyed to the defendants, they have a good title to the property and the plaintiff has no title thereto.

And now, 25th of July, 1894, after argument and upon consideration, the court being of the opinion that the law is with the defendants, judgment is entered in favor of the defendants *non obstante veredicto.*"

11 Fourth. Add to the fifth paragraph of said certificate the text of the opinion of the supreme court of Pennsylvania in the case of Mitchell, administrator, *vs.* defendants, as reported in the regular reports of the decisions in said court, in 165 Pennsylvania State Reports, page 645, as follows:

"*Opinion by Mr. Chief Justice Sterrett, January* 7, 1895.

Although the devise to Amanda Stephens was made before the act of 1833 and without words of inheritance, yet when read in connection with the introductory clause of James S. Stevenson's will there is a plain intent manifested in the first instance to give her an absolute estate. In McCullough *v.* Gilmore, 11 Pa., 370, where substantially the same expression was used, this court said: 'These words and the like of them are generally carried down into the corpus of the will to show that the testator meant to dispose of his whole interest in a particular devise, unless words are used which plainly indicate an intent to limit it.' Numerous cases to the same effect are cited in Schriver *vs.* Meyer, 19 Pa., 87. The first taker is always the favorite object of testator's bounty, and as such entitled to the benefit of every implication.

There are no words used in the second paragraph of the will, containing the devise to Amanda, which indicate any intent to limit her estate. Had the will stopped there the devise would unquestionably have been absolute. The following paragraph was not intended to operate by way of limitation, but was manifestly substitutionary in its character. The thought would very naturally occur to testator to make an alternative devise for the contingency of Amanda's dying without issue—Biddle's Ap., 28 Pa., 59—and this was in effect what was done. 'In the event,' said testator, 'of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally amongst the heirs of John Barber.' The word 'offspring' here used is but a synonym for 'issue,' and issue cannot be lawful without marriage. The devise is then in the first instance to Amanda, and in the event of her dying without issue over to alternative beneficiaries. Dying without issue was thus made the contingency upon which the substituted beneficiaries could take. Coles *vs.* Ayres, 156 Pa., 197. But death when? Where as here there is nothing to indicate an adverse intent, additional limitations dependent on no other contingency than
12 is implied from the language 'if any of them die' or 'in case of death' or the like cannot be referred to the event

whenever it may happen, for that would be to give a forced construction to the words, but must be construed as referring to death in association with some additional circumstance which makes it actually contingent; that circumstance is said to be naturally in regard to the time of happening, and that time, where as here the gift is immediate, is necessarily the death of the testator, there being no other period to which the death can refer. Caldwell *vs.* Skilton, 13 Pa., 152.

This view is strengthened by the presumption that in the absence of a fixed period the power of sale was intended to be exercised at a near rather than a remote period after testator's death. Hill on Trustees, 474. The circumstances which gave rise to the creation of the power must necessarily change and perhaps entirely disappear in the lapse of time. 'A power of sale without limit would doubtless,' said Mr. Justice Clark, in Wilkinson *vs.* Buist, 124 Pa., 253, 261, 'be bad under the rule against perpetuities, and a testator will not be presumed to have intended anything so absurd.' The intended exercise of the power of sale given in this will is referable to the period either of (1) testator's death, or (2) a definite or (3) an indefinite failure of issue. The last may at once be dismissed as too remote; while, as between the other two periods, it is scarce within the range of probability that testator should have intended sale after a long life. The change of circumstances might be radical, whereas at testator's death the change would in all probability be relatively small.

Another consideration of weight is that testator had in view living persons as substituted beneficiaries—the gift over is to the 'heirs,' and therefore the children of John Barber, who was living—and the natural inference is he intended them to take as such.

The suggestion that because of Amanda Stephens' extreme youth testator could not have had in contemplation the contingency of her marriage and death without issue in his lifetime is without merit. No presumption could arise from the fact of making a will that testator expected to die before she should attain a marriageable age. So far as appears from the record he may have had an expectation of long life, but, whatever his expectations, he expressly meets both aspects of the case by providing that 'in the event of her dying unmarried, or, if married, dying' without issue, the estate should go over. She might die in her infancy unmarried or marry and die leaving no issue in his lifetime, and the gift over to the substituted donees would prevent lapse.

There is no reason for discrimination against her on account of age. She was the favorite object of the testator's bounty, and, having survived him, became thereupon seized of the absolute estate intended for her.

The judgment of the court below should therefore be affirmed."

13 Fifth. Add to the sixth paragraph of said certificate the text of the opinion of Judge Acheson, of the circuit court of the United States for the western district of Pennsylvania, in the

case of Samuel Whitehill Barber *et al. vs.* the defendants, as follows:

"*Opinion of the Court.*

Before Acheson and Buffington, JJ.

ACHESON, *Cir. J.:*

The parties to this suit respectively claim title to the land in controversy under the following provisions of the will of James S. Stevenson, deceased:

'I, James S. Stevenson, of the city of Pittsburgh, in the State of Pennsylvania, aged fifty years, on the 12th day of January, 1831, reflecting on the certainty of death, and desirous of making a distribution of my property in the event of my decease, do hereby declare this writing to be my last will and testament, made this twelfth day of March, in the year of our Lord one thousand eight hundred and thirty-one.

I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69 and 70, in the city of Pittsburgh, in their full extent, bounded by Penn street, Wayne street, the Allegheny river and by lot 71. Said Amanda Stephens is now five years old, (born April 7th, 1826) —— Stephens and —— ——, his wife, the parents of Amanda's mother, live near Connellsville, in Fayette Co., Pennsylvania.

In the event of Amanda dying unmarried, or if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Penna.'

The testator died October 16th, 1831. His will was probated on the 18th day of the same month and year.

Amanda Stephens survived the testator, and in the year 1847 intermarried with Samuel Haight. On July 27th, 1848, Amanda and her husband, by deed to Jacob Haight, executed, acknowledged, and recorded, agreeably to the provisions of the statute for barring estates tail, barred any estate tail that Amanda had in the devised lots of ground. Afterwards the title of Amanda, freed from any entail, became vested in the defendants.

Amanda had several children by her husband, Samuel Haight, but they all died in the lifetime of their mother, without having had issue. Amanda died September 28th, 1891. Her husband died previously.

14 The plaintiffs are children and grandchildren of John Barber, deceased. Their position is that Amanda Stephens took no greater estate in the devised lots of ground than a qualified fee, defeasible in the event of her dying without offspring by her husband surviving her, and, this event having happened, that the devise over to the heirs of John Barber took effect.

The defendants insist primarily that Amanda took an estate in fee-simple; but if not, then they contended that she took at least an estate in fee-tail.

The will of James S. Stevenson was considered by the supreme

court of Pennsylvania in the case of Mitchell, administrator, *v.* The Pittsburgh, Fort Wayne & Chicago Company *et al.*, 165 Pa., 645. The court held that, although the testator died before the wills act of 1833, the words in the preamble of his will, 'desirous of making a distribution of my property,' showed an intent to dispose of his whole interest and were to be carried down into the body of the will, and that those words imported an intent to give to Amanda an estate in fee-simple in this particular property notwithstanding the devise over to 'the heirs of John Barber;' that the contingency upon which the estate was to go to them was the death of Amanda 'without offspring by her husband' in the lifetime of the testator, and that Amanda, having survived him, took a fee-simple. The defendants maintain that this decision is conclusive here, but to that proposition we are not able to assent. A single verdict and judgment in ejectment in Pennsylvania not being conclusive in the courts of the State is not conclusive in the courts of the United States. Gibson *vs.* Lyon, 115 U. S., 439. This decision of the supreme court of Pennsylvania, indeed, as a precedent is entitled to peculiar regard, and we would be disposed to follow it, even though we might doubt the correctness of the construction which that court gave to the devise to Amanda Stephens.

The plaintiffs, however, have introduced (under exceptions) some evidence that was not, it seems, before the courts in the former litigation, with reference to the state of facts under which, as they allege, the will of James S. Stevenson was made—facts which they contend are competent aids in construing the will, and call for a different conclusion from that reached by the supreme court of Pennsylvania. On the strength of this evidence it is asserted, in the first place, that Amanda Stephens was the natural child of James S. Stevenson. We are of opinion, however, that there is no competent evidence to establish the truth of this allegation, if it be material. The declarations here mainly relied on were made by a person who was not related either by blood or marriage to James S. Stevenson, and they were made many years after his death. Again, the plaintiffs claim to have shown that Stevenson was dangerously ill for two weeks preceding his death, and of this we think there is satisfactory evidence. Then they have offered the register's record of the probate of the will, which sets forth that the two attesting witnesses deposed before him that on the 16th day of October, 1831, the date of Stevenson's death, as appears *aliunde*, they subscribed their names to the will as witnesses, at the request and in the presence of the testator, who then declared that it was his last will and testament. As this probate was the judicial act of the register and both sides claim under it, we incline to think that the contemporaneous and customary record made by the register in the course of his official duties is competent evidence to show the date on which the testator caused the will to be attested and published in the presence of the subscribing witnesses; but upon the question whether the evidence here relied on warrants a different construction of the will from that adopted in Mitchell, adm'r, *v.* The Pittsburgh, Fort Wayne &

Chicago Railway Company, *supra*, we do not feel called upon to express an opinion. If we were to hold that the devise to Amanda Stephens did not pass to her an estate in fee-simple, this conclusion would not help the plaintiffs, for we cannot agree with them in their contention that Amanda took only a defeasible fee. In our view of this will, if Amanda did not take a fee-simple, she took at least an estate tail.

'Offspring' is a word of limitation, not of purchase. Allen *vs.* Markle, 36 Pa., 117. Speaking of the devise in question, the court in Mitchell, adm'r, *v.* The Pittsburgh, Fort Wayne & Chicago Railway Company, *supra*, said: 'The word "offspring" here used is but a synonym for "issue," and issue cannot be lawful without marriage. The devise is, then, in the first instance, to Amanda and, in the event of her dying without issue, over to alternative beneficiaries.' In Vaughan *vs.* Dickes, 20 Pa., 509, the testator, after a devise to his wife for her life, directed as follows: 'And after the decease of my said wife I give, bequeath, and devise all the aforesaid real estate above described to my son, Peter Dickes, and daughter, Catharine Albertson, to them and their heirs forever, share and share alike, equally to be divided between them; * * * and it is further my will that should my son, Peter Dickes, not marry and have lawful issue, then the said real estate heretofore devised to him shall go to my said daughter, Catharine Dickes, and her heirs forever.' The court held that these words created an estate tail in Peter. In Matlack *vs.* Roberts, 54 Pa., 148, the court decided that the words, 'I give and devise to my sons all the residue of my estate, real and personal, * * * and in case of the death of either of my children unmarried or without issue, then I do order that the share of said child or children so dying may be divided equally among my surviving daughters or their heirs,' created an estate tail in the sons. The authority of these decisions is unshaken.

16 It will be perceived from the above quotation from the opinion in Mitchell, adm'r, *vs.* The Pittsburgh, Fort Wayne & Chicago Railway Company, *supra*, that the court treated the word 'unmarried' as unimportant, holding that the devise over was in the event of Amanda's dying without issue.

Now, it is firmly established by an unbroken line of authorities, among which are Vaughan *vs.* Dickes, *supra*, and Matlack *vs.* Roberts, *supra*, that a devise over to named living persons upon the failure of the issue of the first taker does not import a definite failure of issue. In the leading case of Eichelberger *vs.* Barnitz, 9 Watts, 447, 449, the devise, which there was adjudged to create an estate tail, contained these words: 'And further my will is, because my son Henry is not yet married, that if he should die without leaving any lawful issue, that then his full share shall fall or go in equal share to my three other children, Adam and Mary Ann and Susannah, to one of them as much as to the other.' Here the devise over was not only to named living children of the testator, but it was to them distributively in equal shares. To hold at this late day that such a devise over imports a definite failure of issue would shake a multitude of titles. The authority of Eichelberger *vs.* Barnitz, *supra*, was

fully recognized in the recent case of Hackney *vs.* Tracy, 137 Pa., 53. The case of Middleswarth *vs.* Blackmore, 74 Pa., 414, was decided upon the peculiar provisions of the will there involved. It does not furnish a rule for this case. Amanda Stephens was the preferred object of the testator's bounty, and the construction should incline toward making the gift as effectual to her as possible. We are satisfied that upon any admissible construction of the will of James S. Stevenson the title to the land in dispute is in the defendants."

Buffington, J., concurs.

The attorneys for plaintiffs and defendants request the court to amend its certificate hereinbefore filed as above specified.

JOHN S. FERGUSON,
S. DUFFIELD MITCHELL,
Attorneys for Plaintiffs.
D. T. WATSON,
Attorneys for P., Ft. W. & C. R'y Co.
WILLIAM SCOTT,
Of Scott & Gordon, Attorneys for Pennsylvania Co., Lessee.

January 23, 1896.

17 And now, January 28th, 1896, in view of the fact that counsel, representing all parties, have united in making the foregoing suggestion and in asking that the same shall be incorporated with the certificate heretofore certified, it is now directed that said suggestions be attached to said certificate with like effect as if originally embodied therein.

In testimony whereof the undersigned judges, holding the said court of appeals, have hereunto set their hands and seals the day and year aforesaid.

GEO. M. DALLAS, *Cir. Judge.* [SEAL.]
WM. BUTLER, *J.* [SEAL.]
L. E. WALES, *J.* [SEAL.]

18 UNITED STATES OF AMERICA, *set:*

I, William V. Williamson, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original certificate of questions filed by the judges of the United States circuit court of appeals for the third circuit in case of Samuel Whitehill Barber, Richard Treat Leech and Mary Ann Leech, his wife, in right of said wife; Edward P. Clarke, George Hepburn Watson and Anne Townsend Watson, his wife, in right of said wife, and Carver Worthington Barber, respectively citizens of the States of Missouri, Ohio, New Jersey, and Minnesota, & The Pittsburgh, Fort Wayne and Chicago Railway Company and The Pennsylvania Company, lessee, both corporations and citizens of the State of Pennsylvania, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 30th day of January, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. V. WILLIAMSON,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] No. —. Sept. term, 1895. United States circuit court of appeals, third circuit. Samuel Whitehill Barber *et al.*, plaintiffs in error, *v.* The Pittsburgh, Fort Wayne & Chicago Railway Co. and The Pennsylvania Co., lessee. Certified copy of questions submitted to the United States Supreme Court.

Endorsed on cover: Case No. 16,175. U. S. circuit court of appeals, third circuit. Term No., 885. Samuel Whitehill Barber, Richard Treat Leech, and Mary Ann Leech *et al.*, plaintiffs in error, *vs.* The Pittsburgh, Ft. Wayne and Chicago Railway Company and The Pennsylvania Company. Filed February 4th, 1896.

431.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

No. *September Term, 1895.*

SAMUEL W. BARBER et al., Plaintiffs in Error,

VERSUS

THE PITTSBURGH, FT. WAYNE & CHICAGO RAILWAY COMPANY and THE PENNSYLVANIA COMPANY, Defendants in Error.

RECORD on Writ of Error to Judgment entered by the United States Circuit Court for the Western District of Pennsylvania.

S. DUFFIELD MITCHELL,
JOHN S. FERGUSON,
Counsel for Plaintiffs in Error.

SCOTT & GORDON,
WATSON & McCLEAVE,
Counsel for Defendants in Error.

SMITH BROS. FRANKLIN PRINT 405 GRANT ST., PITTSBURGH.

IN THE

United States Circuit Court of Appeals,

THIRD CIRCUIT.

No. *September Term, 1895.*

SAMUEL W. BARBER et al., Plaintiffs in Error,

VERSUS

THE PITTSBURGH, FT. WAYNE & CHICAGO RAILWAY COMPANY and THE PENNSYLVANIA COMPANY, Defendants in Error.

Among the rolls, records and judicial proceedings in the Circuit Court of the United States for the Western District of Pennsylvania, at No. 10, May Term 1895, may be found the following words and figures, to wit:

Samuel Whitehill Barber, Richard Treat Leech and Mary Ann Leech, his wife in right of said wife, Edward P. Clarke, George Hepburn Watson and Anne Townsend Watson, his wife in right of said wife, and Carver Worthington Barber, respectively citizens of the States of Missouri, Ohio, New Jersey and Minnesota.

VERSUS

The Pittsburgh, Fort Wayne and Chicago Railway Company, and the Pennsylvania Company, Lessee, both corporations and citizens of the State of Pennsylvania.

No. 10, May Term, 1895.

DOCKET ENTRIES.

Summons in ejectment issued February 2, 1895, for all that certain tract or lot of land situate in the Fourth Ward

of the City of Pittsburgh, County of Allegheny and State of Pennsylvania, being lots 67, 68, 69 and 70 of Woods General Plan of Pittsburgh bounded and described as follows: Beginning at the northeast corner of Penn Avenue and Tenth Street (formerly Wayne Street); thence northwardly by line of said Tenth Street five hundred and ninety-six (596) feet two (2) inches more or less to Duquesne Way; thence eastwardly along the line of Duquesne Way two hundred and forty-two (242) feet four and one-half (4½) inches more or less to the westerly line of lot No. 71 in the said Wood's General Plan of Pittsburgh; thence southwardly by the line of said lot No. 71 six hundred and twenty-nine (629) feet ten and one-half (10½) inches more or less to Penn Avenue; and thence by line of Penn Avenue two hundred and forty (240) feet more or less, to the place of beginning; upon which are erected two brick office buildings and a frame freight depot upon which are laid and constructed railroad sidings, the right of possession or title to which they the said plaintiffs aver is in them and not in the said defendants. Returnable first Monday of February next.

1895, Feb. 4. Precipe for appearance of Scott & Gordon for Pennsylvania Company, filed.

1895, Feb. 4. Summons returned served on the Pittsburgh, Ft. Wayne & Chicago Railway Company, by giving a true and attested copy thereof to Jno. J. Haley, Secretary and Treasurer of said Company, at his place of business, No. 1003 Penn Avenue, Pittsburgh, Pa.; also served the Pennsylvania Company, Lessee, by leaving a true and attested copy with Wm. Scott, of Scott & Gordon, solicitors for said Company, who also accepted service of said Writ. (See acceptance on writ) Mar. $5.00.

1895, Feb. 25. Deposition of Mary Blaine Smith, an aged and infirm witness on part of plaintiffs filed.

1895, March 28th. Defendant's plea and Abstract of Title filed and notice of service.

1895, March 30. Plaintiff's replication to plea and answer to defendant's abstract of title filed.

1895, May 17th. Deposition of Mrs. E. S. Russell taken under agreement of counsel filed.

1895, May 24th. The parties in this cause being at issue and having agreed that the cause be tried by the Court without the intervention of a jury proceed to trial. S. D. Mitchell and J. S. Ferguson, Esqrs, appear for plaintiffs and Johns McCleave and Wm. Scott, Esqs., for defendants, and the parties offer their evidence pro and con and argue the questions of law and fact. C. A. V.

1895, Aug 2nd. The findings of the fact and opinion of the Court filed, awarding judgment in favor of defendants and judgment entered accordingly.

H. D. GAMBLE,
Clerk.

Eo die Exceptions of plaintiff noted.

1895, Aug. 26. Assignments of Error filed.

Aug. 31, 1895. Writ of Error allowed and issued. Same day day. Bond approved and Citation allowed and issued. Same day Citation served.

1895, Aug. 31st. Bill of Exceptions sealed and filed.

PRAECIPE FOR SUMMONS IN EJECTMENT.

Issue summons in ejectment against the defendants, The Pittsburgh, Fort Wayne & Chicago Railway Company, and The Pennsylvania Company, lessee, both companies being corporations, created by, and organized under, the laws of the State of Pennsylvania, and both having their chief place for the transaction of business at the City of Pittsburgh, County of Allegheny and State of Pennsylvania, to appear and answer to a certain complaint, made by Samuel Whitehill Barber, a citizen of the City of St. Louis and State of Missouri; Richard Treat Leech and Mary Ann Leech, his wife, in right of said wife, citizens of the City of Dayton, County of Montgomery and State of Ohio; Edward P. Clark, a citizen of Jersey City, County of Hudson, and State of New Jersey; George Hepburn Watson and Anne Townsend Watson, his wife, in right of said wife, citizens of the County of Union, State of New Jersey; and Carver Worthington Barber, a citizen of the City of Red Wing, County of Goodhue and State of Minnesota, that they, the said The Pittsburgh, Fort Wayne & Chicago Railway Company and The Pennsylvania Company, lessee, have in their actual possession a lot or tract of land, situate in the Fourth ward of the City of Pittsburgh, County of Allegheny and State of Pennsylvania, being lots 67, 68, 69 and 70 of Wood's General Plan of Pittsburgh, bounded and described as follows, viz:

Beginning at the northeast corner of Penn Avenue and Tenth Street (formerly Wayne Street); thence northwardly by line of said Tenth Street, five hundred and ninety-six (596) feet two (2) inches, more or less, to Duquesne Way; thence eastwardly along the line of Duquesne Way two hundred and forty-two (242) feet four and one-half

(41½) inches, more or less, to the westerly line of lot No. 71 in the said Wood's General Plan of Pittsburgh; thence southwardly by the line of the said lot No. 71, six hundred and twenty-nine (629) feet ten and one-half (10½) inches, more or less, to Penn Avenue; and thence by the line of Penn Avenue, two hundred and forty (240) feet, more or less, to the place of beginning; upon which are erected two brick office buildings, and a frame freight depot, and upon which are laid and constructed railroad sidings; the value of which lots of land, exclusive of costs, is largely in excess of the sum of $2,000; the right of possession or title to which they, the said Samuel Whitehill Barber, Richard Treat Leech and Mary Anne Leech, his wife, in right of said wife, Edward P. Clarke, George Hepburn Watson and Anne Townsend Watson, his wife, in right of said wife, and Carver Worthington Barber, say is in them, and not in the said The Pittsburgh, Fort Wayne & Chicago Railway Company and The Pennsylvania Company, lessee, all of which said plaintiffs aver that they are prepared to prove.

Returnable according to law.

S. D. MITCHELL,
J. S. FERGUSON,
Attys. for Plaintiffs.

February 2, 1895.

To H. D. GAMBLE, ESQ., *Clerk of Circuit Court of U. S. for Western District of Penn'a.*

PLAINTIFF'S ABSTRACT OF TITLE.

1. John Penn and John Penn Jr. by their deed, dated November 7th, 1791, and recorded in the office for recording deeds in and for Allegheny County, Pennsylvania, in deed book vol. 4 page 426, granted and conveyed lots 67, 68, 69 and 70 in the General Plan of Pittsburgh to John Woods, in fee simple.

2. Will of John Woods, deceased, dated September 20, 1816, probated....., and on record in the Register's Office of said Allegheny County, in Will Book No. 2, page 106, ordered and directed his executors to sell for the payment of his debts all of testator's real estate, not otherwise specifically devised (said lots were not specifically devised).

3. James Ross, John McDonald and Henry Woods, executors of John Woods, deceased, by their deed, dated September 23, 1823, and recorded in the said office for recording deeds in Deed Book vol. 30, page 442, granted and conveyed said lots to Christopher Cowan, in fee simple.

4. Christopher Cowan, by deed, dated November 15, 1824, and recorded in the said office for recording deeds in Deed Book vol. 31, page 351, granted and conveyed said lots to James S. Stevenson, in fee simple.

5. On October 16, 1831, James S. Stevenson, executed and published his last will and testament, when he was on his death bed, a few hours before his death, with the full knowledge and expectation of the prompt and early happening of that event, and died on said October 16, 1831.

6. Will of James S. Stevenson, deceased, dated March 11, 1831, and recorded in the said Register's Office in Will Book vol. 3, page 550, devised as follows, viz:—

"I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69 and 70 in the City of

Pittsburgh, in their full extent, bounded by Penn Street, Wayne Street, the Allegheny River and by lot 71. Said Amanda Stephens is now five years old (born April 7, 1826) ..... Stephens and ..... his wife, the parents of Amanda's mother, live near Connellsville, Fayette County, Penna.

In the event of Amanda dying unmarried, or, if married, dying without offspring by husband, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Pa."

7. Amanda Stephens was the natural daughter of James S. Stevenson; she survived the said Stevenson and on December 2, 1847, intermarried with Samuel Haight, and afterwards had offspring by him, five children, all of whom died prior to the death of the said Amanda, without ever having had issue. The said Samuel Haight died on November 26, 1876; and the said Amanda died on September 28, 1891.

8. At the date of the will and of the death of James S. Stevenson, John Barber, named in the will of the said Stevenson, was married and had children in full life, of whom the following are living, viz:

(*a*) Samuel Whitehill Barber, (*b*) Mary Ann Barber, intermarried with Richard Treat Leech, and (*c*) Emma Colton Barber, intermarried with James J. Creigh; and of whom the following are deceased, leaving children, viz: (*d*) William Edwin Barber, deceased, leaving issue, Edwin Atlee Barber, William T. Barber, Anne Townsend Barber, intermarried with George Hepburn Watson, Eleanor Cresson Barber intermarried with James C. Sellers, Walter Barber and Elizabeth Stiles Barber; (*e*) Elizabeth Wright Barber, intermarried with Sydenham Rush Clarke, both deceased, leaving issue Edward P. Clarke; and of whom one child, (*f*) John James Barber, was born subsequent to the death

of the said Stevenson, and is now deceased, leaving issue, Carver Worthington Barber.

9. Samuel Whitehill Barber, Mary Ann Leech and her husband, Richard Treat Leech, Emma Colton Creigh and her husband, James J. Creigh, Edwin Atlee Barber, William T. Barber, Anne Townsend Watson, and her husband George Hepburn Watson, Eleanor Cresson Sellers and her husband, James C. Sellers, Walter Barber, Elizabeth Stiles Barber, Edward P. Clarke and Carver Worthington Barber, heirs of John Barber, deceased, by their agreement or deed poll, dated January 19, 1895, and recorded February 1, 1895, in the said office for recording deeds in Deed Book Vol. , page , agreed and elected to take as land said lots, above described, devised to them after the death of the said Amanda Stephens and to hold the same to them, their heirs and assigns, as real estate.

10. James J. Creigh and Emma Colton Creigh, his wife, Edwin Atlee Barber and Nellie Louise Barber, his wife, William T. Barber and Anna Reigart Barber, his wife, James C. Sellers and Eleanor Cresson Sellers, his wife, Walter Barber and Elizabeth Stiles Barber, by their deed dated January 19, 1895, and recorded February 1, 1895, in the said office for recording deeds in Deed Book Vol. , page , granted and conveyed all their undivided interests and estates in and to said lots to Samuel Whitehill Barber in fee simple.

S. D. Mitchell,
J. S. Ferguson,
Attys. for Plaintiffs.

February 2, 1895.

SUMMONS.

United States
Western District of Pennsylvania. } *Set.*

THE PRESIDENT OF THE UNITED STATES.

To the Marshal of the Western District of Pennsylvania, Greeting:

WE COMMAND YOU, that you summon The Pittsburgh, Ft. Wayne & Chicago Railway Company and the Pennsylvania Company, Lessee, both companies being corporations created by, and organized under the laws of the State of Pennsylvnnia, and both having their chief place for the transaction of business at the City of Pittsburgh, County of Allegheny and State of Pennsylvania late of your District, if they be found therein, so that they be and appear before the Judges of the Circuit Court of the United States, in and for the Western District of Pennsylvania in the Third Circuit, at a session of the same Court, to be holden at Pittsburgh, on the first Monday of February next, to answer Samuel Whitehill Barber, a citizen of the City of St. Louis and State of Missouri; Richard Treat Leech and Mary Ann Leech, his wife, in right of said wife, citizens of the City of Dayton, County of Montgomery, and State of Ohio; Edward P. Clarke, a citizen of Jersey City, County of Hudson, and State of New Jersey; George Hepburn Watson and Anne Townsend Watson, his wife, in right of said wife, citizens of the County of Union, State of New Jersey; and Carver Worthington Barber, a citizen of the City of Red Wing, County of Goodhue and State of Minnesota, in an action of ejectment for all that lot or tract of land, situate in the Fourth Ward of the City of Pitsbugh, County of Allegheny and State of Pennsylvania, being lots 67, 68, 69 and 70 of

Wood's General Plan of Pittsburgh, bounded and described as follows, viz:

Beginning at the northeast corner of Penn Avenue and Tenth Street (formerly Wayne Street); thence northwardly by line of said Tenth Street, five hundred and ninety-six (596) feet two (2) inches, more or less, to Duquesne Way; thence eastwardly along the line of Duquesne Way two hundred and forty-two feet (242) four and one-half ($4\frac{1}{2}$) inches, more or less to the westerly line of lot No. 71 in the said Wood's General Plan of Pittsburgh; thence southwardly by the line of said lot No. 71, six hundred and twenty-nine (629) feet ten and one-half ($10\frac{1}{2}$) inches, more or less, to Penn Avenue; and thence by the line of Penn Avenue, two hundred and forty (240) feet, more or less, to the place of beginning; upon which are erected two brick office buildings, and a frame freight depot, and upon which are laid and constructed railroad sidings; the value of which lots of land exclusive of costs, is largely in excess of the sum of $2,000; and have you then and there this writ. The title to which the said plaintiffs aver is in them and not in said defendants:

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, at Pittsburgh, this second day of February, A. D. 1895, and in the One Hundred and nineteenth year of the Independence of the said United States.

[SEAL.]

H. D. GAMBLE,
Clerk.

Feb'y 2, 1895. Served the within summons in ejectment on the Pittsburgh, Ft. Wayne & Chicago Railway Company by giving a true and attested copy thereof to John J. Haley, Secretary and Treasurer of said Company at his place of business No. 1003 Penn Avenue, Pittsburgh, Pa.

Feb'y 4, 1895, served the Pennsylvania Company, lessee, by leaving a true and attested copy with Wm. Scott, Esq., of Scott & Gordon, Solicitors for said company, who also accepted service of said writ. See acceptance on this writ. So answers JOHN W. WALKER,

Service $5.00. *United States Marshal.*

Feb'y 4, 1895, Service of within writ accepted for the Pennsylvania Company, one of the within named defendants.

SCOTT & GORDON.

DEFENDANT'S PLEA AND ABSTRACT OF TITLE.

And now, to wit, March 28, 1895, come the defendants, the Pittsburgh, Fort Wayne & Chicago Railway Company, by Watson & McCleave, its attorneys, and the Pennsylvania Company, by Scott & Gordon, its attorneys, and make defence for the whole of the property described in the writ; and the said defendants do severally to the said action plead not guilty, and file this their statement, containing an abstract of the title or facts upon which said defendants rely for their defence, as follows, to wit:

1. The defendants admit paragraphs Nos. 1, 2, 3 and 4 of the plaintiff's abstract of title, showing title in fee simple to the property described in the writ in James S. Stevenson, at and prior to the time of his death.

2. The defendants admit the sixth paragraph of plaintiff's abstract of title, being the devise of said premises by the said James S. Stevenson.

3. The defendants admit the statements of the seventh paragraph of plaintiff's abstract of title, to this extent only, to wit, that Amanda Stephens, the devisee of James S. Stevenson, survived the said testator, and, in the year 1847, married Samuel Haight.

4. The said Amanda with her husband, Samuel Haight, by deed dated July 27, 1848, recorded in Allegheny County in Deed Book Vol. 84, page 154, granted and conveyed said premises to Jacob Haight in trust to reconvey the same to the said Samuel Haight, and in said deed declared their intention to debar any estate tail in said lands, which said deed was on November 3, 1848, presented in open court in the Court of Common Pleas of Allegheny County, and it was thereupon ordered that the same be recorded in the manner commonly used with respect to sheriff's deeds, and the same was so recorded, and, on November 15, 1848, was also recorded in the Recorder's Office in and for the said County of Allegheny, in Deed Book Vol. 84, page 154.

5. The said Jacob Haight, by deed dated ...., 1848, and recorded in said Recorder's Office, in Deed Book Vol. 84, page 166, granted and conveyed said land unto the said Samuel Haight.

6. The said Samuel Haight and the said Amanda, his wife, by deed dated March 14, 1855, and recorded in Deed Book Vol. 117, page 528, granted and conveyed a part of said land to James McCully.

7. The said James McCully, by a deed, dated June 29, 1864, and recorded in Deed Book Vol. 184, page 48, granted and conveyed the same part of said land to the Pittsburgh, Fort Wayne & Chicago Railway Company, one of the defendants in this case.

8. The said Samuel Haight and the said Amanda, his wife, by deed dated April 10, 1857, and recorded in Deed Book Vol. 129, page 488, granted and conveyed the other portion of said land to the Pittsburgh, Fort Wayne & Chicago Railroad Company.

9. John Ferguson and Thomas E. Walker, trustees and special master commissioners, by a deed, dated February 18, 1862, and recorded in Deed Book Vol. 152, page 495,

executed pursuant to and by virtue of a decree of the Circuit Court of the United States for the Western District of Pennsylvania, in a suit in chancery, wherein Charles Moran and others were complainants, and the said Pittsburgh, Fort Wayne & Chicago Railroad Company and others were defendants, conveyed the last mentioned portion of said land unto James F. D. Lanier, Samuel J. Tilden, Louis H. Meyer, John Edgar Thompson and Samuel Hanna.

10. The said Pittsburgh, Fort Wayne & Chicago Railroad Company, by a deed dated February 25, 1863, recorded in Deed Book Vol. 152, page 501, conveyed the same unto the said James F. D. Lanier, et al.

11. The said James F. D. Lanier, et al., by deed, dated March 2, 1862, and recorded in Deed Book Vol. 154, page 445, conveyed the same unto the Pittsburgh, Fort Wayne & Chicago Railway Company, one of the defendants in this case.

12. The said Pittsburgh, Fort Wayne & Chicago Railway Company, by a lease, dated June 7, 1869, and recorded in Deed Book Vol. 250, page 82, demised and let unto the Pennsylvania Railroad Company the land described in the precipe filed in this case, for the term of 999 years from the first day of July, 1869.

13. The said Pennsylvania Railroad Company, by an assignment, dated April 1, 1873, and recorded in Deed Book Vol. 772, page 43, assigned and transferred said lease and the leasehold estate thereby created unto the Pennsylvania Company, the other defendant in this case.

14. The defendants hereby deny so much of the plaintiff's abstract of title as is not herein specifically admitted, and by way of more specific denial or objection thereto further say: (a) The defendants aver and object that the statements in the fifth paragraph of plaintiff's abstract of title, save as to the date of death of said testator are immaterial and irrelevant to any issue raised in this case. They

believe it to be true that the said testator, James S. Stevenson, died on or about October 16th, 1831, having previously executed his last will and testament in writing, but save and except as to the date of said testator's death the statements of said paragraph are denied. (b) Defendants aver and object that the statements of the seventh paragraph of plaintiff's abstract of title as to the parentage of the said Amanda Stephens, the birth of her children and their death with or without issue, and all the statements of the eighth, ninth and tenth paragraphs of plaintiff's abstract of title are immaterial and irrelevant to any issue raised in this case. The said statements of the seventh paragraph and all of the statements of the eighth, ninth and tenth paragraphs of said abstract of title are denied.

15. At No. 687, April Term, 1893, of the Court of Common Pleas No. 2 of Allegheny County, Pa., S. Duffield Mitchell, as administrators d. b. n. c. t. a. of the estate of said James S. Stevenson, deceased, brought his action of ejectment against the present defendants for the land described in the present writ, claiming to recover the same as legal plaintiff in trust for the heirs of John Barber, deceased, under the same title now set forth in plaintiff's abstract of title in the present case, which former case was so preceded in that judgment was entered therein by said Court of Common Pleas in favor of the defendants, and said judgment was affirmed by the Supreme Court of Pennsylvania at No. 257, October Term, 1894, of said last named court; which judgment the defendants aver is a rule of property as to the construction of the will of said testator, James S. Stevenson, with respect to real estate situate within the State of Pennsylvania, and is binding and conclusive upon the present plaintiffs in this court as well as in the courts of the State of Pennsylvania.

WATSON & MCCLEAVE,
Attorneys for Pittsburgh Ft. Wayne & Chicago R. R. Co.
SCOTT & GORDON,
Attorneys for Pennsylvania Company.

PLAINTIFFS REPLICATION TO PLEA AND ANSWER TO DEFENDANT'S ABSTRACT OF TITLE.

And now, to wit, March 30th, 1895, come the plaintiffs, by S. D. Mitchell and J. S. Ferguson, their attorneys and for answer and replication to the abstract of title, filed by defendants in the above stated case, aver and allege as follows, to wit:—

(1.) Plaintiffs admit paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of defendants' abstract of title, but they aver that under and by the last will and testament of James S. Stevenson, set forth in the sixth (6) paragraph of plaintiff's abstract of title, said Amanda Stephens, the devisee therein, did not take an unconditional absolute estate in fee simple, nor did she take an estate in fee-tail; but that she took no greater estate than a defeasible or qualified fee, in the event of her death without leaving offspring by her husband, and which having happened, by the terms of the aforesaid will upon the death of said Amanda, the premises described in the ejectment writ herein, became the property in fee simple of the heirs of John Barber, of Columbia, Pa.

(2.) The plaintiffs admit the statements of the 15th paragraph of defendant's abstract of title, but deny that the judgment of the Supreme Court of Pennsylvania No. 257 October Term, 1894, mentioned therein has become a rule of property respecting real estate situate in Pennsylvania, and is therefore binding upon and conclusive against the plaintiffs in this court. Said case No. 257 October Term, 1894, was submitted upon facts specially found by the jury therein, and the facts averred in the fifth paragraph of plaintiff's abstract of title herein (excepting the date of James S. Stevenson's death) and the further fact that Amanda Stephens was the natural daughter of James S. Stevenson, averred in the 7th paragraph of plaintiff's abstract of title herein, were not part of the special finding of the jury in that case, nor was there evidence produced and offered tending to prove the said

facts averred in the 5th and 7th paragraphs of plaintiff's abstract of title.

And plaintiffs aver, notwithstanding the several denials of the defendants that each and all of the facts set forth in the abstract filed by them, the said plaintiffs, are true.

S. D. MITCHELL,
J. S. FERGUSON,
Att'ys for Plaintiffs.

March 30, 1895.

AGREEMENT WAIVING A JURY and for determination of all issues of fact by the Court.

And now, to wit, May 20th, 1895, the undersigned attorneys of record of the parties to the above entitled cause, do agree that a jury therein shall be waived, and that all issues of fact in said cause shall be tried and determined by the Court without the intervention of a jury.

S. D. MITCHELL,
Atty for Plaintiffs.
WATSON & MCCLEAVE,
Attys for P., Ft. W. & C. Ry. Co.
SCOTT & GORDEN,
Attys for Penna. Co. Lessee.

OPINION OF THE COURT.

BEFORE ACHESON AND BUFFINGTON, J. J.

ACHESON, CIR. J.:

The parties to this suit respectively claim title to the land in controversy, under the following provisions of the will of James S. Stevenson, deceased.

"I, James S. Stevenson, of the city of Pittsburgh, in the State Pennsylvania, aged fifty years on the 12th day of January, 1831, reflecting on the certainty of death, and desirious of making a distribution of my property in the event

of my decease, do hereby declare this writing to be my last will and testament, made this twelfth day of March, in the year of our Lord, one thousand eight hundred and thirty-one.

I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69 and 70, in the city of Pittsburgh, in their full extent bounded by Penn street, Wayne street, the Allegheny river and by lot 71. Said Amanda Stephens is now five years old (born April 7th, 1826). ——— Stephens and ——— his wife, the parents of Amanda's mother, live near Connellsville, in Fayette Co., Pennsylvania.

In the event of Amanda dying unmarried or if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber of Columbia, Penn'a."

The testator died October 16th, 1831. His will was probated on the eighteenth day of the same month and year.

Amanda Stephens survived the testator, and in the year 1847, intermarried with Samuel Haight. On July 27th, 1848, Amanda and her husband, by deed to Jacob Haight, executed, acknowledged and recorded, agreeably to the provisions of the statute for barring estates-tail, barred any estate-tail that Amanda had in the devised lots of ground. Afterwards the title of Amanda, freed from any entail, became vested in the defendants.

Amanda had several children by her husband, Samuel Haight, but they all died in the life time of their mother, without having had issue. Amanda died September 28th, 1891. Her husband died previously.

The plaintiffs are children and grandchildren of John Barber, deceased. Their position is, that Amanda Stephens took no greater estate in the devised lots of ground than a qualified fee, defeasible in the event of her dying without offspring, by her husband, surviving her, and this event hav-

ing happened, that the devise over to the heirs of John Barber took effect.

The defendants insist primarily, that Amanda took an estate in fee-simple; but if not, then they contended that she took, at least, an estate in fee-tail.

The will of James S. Stevenson was considered by the Supreme Court of Pennsylvania, in the case of *Mitchell, Administrator, v. The Pittsburgh, Fort Wayne & Chicago Company, et al.*, 165 Pa., 645. The Court held that, although the testator died before the Wills Act of 1833, the words in the preamble of his will—"desirious of making a distribution of my property"—showed an intent to dispose of his whole interest and were to be carried down into the body of the will, and that those words imported an intent to give to Amanda an estate in fee-simple in this particular property, notwithstanding the devise over to "the heirs of John Barber;" that the contingency upon which the estate was to go to them was the death of Amanda, "without offspring by her husband" in the life time of the testator, and that Amanda, having survived him, took a fee-simple. The defendants maintain that this decision is conclusive here. But to that proposition we are not able to assent. A single verdict and judgment in ejectment in Pennsylvania, not being conclusive in the Courts of the State, is not conclusive in the Courts of the United States. *Gibson v. Lyon*, 115 U. S., 439. This decision of the Supreme Court of Pennsylvania, indeed, as a precedent is entitled to peculiar regard and we would be disposed to follow it, even though we might doubt the correctness of the construction which that Court gave to the devise to Amanda Stephens.

The plaintiffs, however, have introduced (under exceptions) some evidence that was not, it seems, before the Courts in the former litigation, with reference to the state of facts under which, as they allege, the will of James S. Stevenson was made—facts which they contend are competent aids in construing the will, and call for a different conclusion

from that reached by the Supreme Court of Pennsylvania. On the strength of this evidence it is asserted, in the first place, that Amanda Stephens was the natural child of James S. Stevenson. We are of opinion, however, that there is no competent evidence to establish the truth of this allegation, if it be material. The declarations here mainly relied on were made by a person who was not related either by blood or marriage to James S. Stevenson, and they were made many years after his death. Again, the plaintiffs claim to have shown that Stevenson was dangerously ill for two weeks preceding his death, and of this we think there is satisfactory evidence. Then, they have offered the register's record of the probate of the will, which sets forth that the two attesting witnesses deposed before him, that on the 16th day of October, 1831,—the date of Stevenson's death, as appears *aliunde*—they subscribed their names to the will as witnesses at the request and in the presence of the testator, who then declared that it was his last will and testament. As this probate was the judicial act of the register and both sides claim under it, we incline to think that the contemporaneous and customary record made by the register in the course of his official duty is competent evidence to show the date on which the testator caused the will to be attested, and published it in the presence of the subscribing witnesses. But upon the question, whether the evidence here relied on warrants a different construction of the will from that adopted in *Mitchell, Administrator, v. The Pittsburgh, Fort Wayne and Chicago Railway Company*, *supra*, we do not feel called upon to express an opinion. If we were to hold that the devise to Amanda Stephens did not pass to her an estate in fee simple, this conclusion would not help the plaintiffs, for we cannot agree with them in their contention that Amanda took only a defeasible fee. In our view of this will, if Amanda did not take a fee-simple, she took, at least, an estate-tail.

"Offspring" is a word of limitation, not of purchase.

Allen v. Markle, 36 Pa. 117. Speaking of the devise in question, the Court in *Mitchell, Administrator, v. The Pittsburgh, Fort Wayne and Chicago Railwey Company, supra*, said: "The word 'offspring,' here used is but a symonym for 'issue;' and 'issue' cannot be lawful without marriage. The devise is then in the first instance to Amanda; and in the event of her dying without issue over to alternative beneficiaries." In *Vaughan v. Dickes*, 20 Pa. 509, the testator after a devise to his wife for her life, directed as follows: "And after the decease of my said wife, I give, bequeath, and devise all the aforesaid real estate above described to my son Peter Dickes and daughter Catharine Albertson, to them and their heirs forever, share and share alike, equally to be divided between them; * * * * and it is further my will that should my son Peter Dickes not marry and have lawful issue, then the said real estate heretofore devised to him shall go to my said daughter Catharine Dickes and her heirs forever." The Court held that these words created an estate-tail in Peter. In *Matlack v. Roberts*, 54 Pa. 148, the Court decided that the words, "I give and devise to my sons all the residue of my estate, real and personal. * * * And in case of the death of either of my children unmarried or without issue, then I do order that the share of said child or children so dying may be divided equally among my surviving daughters or their heirs," created an estate-tail in the sons. The authority of these decisions is unshaken. It will be perceived from the above quotation from the opinion in *Mitchell, Administrator, v. The Pittsburgh, Fort Wayne and Chicago Railway Company, supra*, that the Court treated the word, "unmarried" as unimportant, holding that the devise over was in the event of Amanda's dying without issue.

Now, it is firmly established by an unbroken line of authorities, among which are *Vaughan vs. Dickes, supra*, and *Matlack vs. Roberts, supra*, that a devise over to named

living persons upon the failure of the issue of the first taker does not import a definite failure of issue. In the leading case of *Eichelberger vs. Barnitz*, 9 Watts, 447, 449, the devise, which there was adjudged to create an estate tail contained these words: "And further my will is, because my son, Henry, is not yet married, that if he should die without leaving any lawful issue, that then his full share shall fall or go in equal share to my other three children, Adam and Anna Mary and Susannah, to one of them as much as to the other." Here the devise over was not only to named living children of the testator, but it was to them distributively in equal shares. To hold at this late day that such a devise over imports a definite failure of issue, would shake a multitude of titles. The authority of *Eichelberger vs. Barnitz*, *supra*, was fully recognized in the recent case of *Hackney vs. Tracy*, 137 Pa. 53. The case of *Middlesworth vs. Blackmore*, 74 Pa. 414, was decided upon the peculiar provisions of the will there involved. It does not furnish a rule for this case. Amanda Stephens was the preferred object of the testator's bounty, and the construction should incline toward making the gift as effectual to her as possible. We are satisfied that upon any admissible construction of the will of James S. Stevenson the title to the land in dispute is in the defendants.

Buffington, J., concurs.

FINDING OF THE COURT.

In pursuance of a written stipulation, this cause was tried by the Court without the intervention of a jury; and now, August 2, 1895, upon due consideration, the Court finds for the defendants; and it is ordered that judgment be entered in their favor. BY THE COURT.

And thereupon the plaintiffs did then and there except to the rulings and opinion of the Court, and to its action in finding for the defendants upon the evidence, and in directing judgment to be entered in their favor; and in not finding upon the evidence in favor of the plaintiffs and entering judgment for them; and upon the request of the plaintiffs this bill of exceptions is sealed.

M. W. ACHESON, [SEAL]
Circuit Judge.

ASSIGNMENTS OF ERROR.

And now, August 26th, 1895, comes Samuel Whitehill Barber, Richard Treat Leach and Mary Ann Leach, his wife, Edward P. Clarke, George Hepburn Watson and Anne Townsend Watson, his wife, and Carver Worthington Barber, by John S. Ferguson and S. Duffield Mitchell, their attorneys, and say that in the record, wherein the above-mentioned parties are plaintiffs, and The Pittsburgh, Ft. Wayne & Chicago Railway Company and The Pennsylvania Company are defendants, as above set forth, there is manifest error, to wit:

First: The learned court below erred in holding and ruling that the following deposition of Mrs. Mary Blaine Smith, admitted as evidence at the trial of this case, was not competent evidence to establish the fact that Amanda Stephens was the natural daughter of James S. Stevenson, to wit:

Deposition of Mrs. Mary Blaine Smith in part, as follows:

"I was born in November, 1803, in Shippensburg, then Franklin, but now Cumberland County, Pennsylvania. I came to Pittsburgh to live in 1810. My father's name was Francis Herron, a clergyman, and pastor of the First Presbyterian Church, Pittsburgh. When we first came to Pittsburgh, we lived at the corner of Penn and Marberry Streets. We lived there about two years. My father then built a house at the corner of Tenth (Wayne Street) and Penn, to which we moved. The house was on the corner where Dilworth's coffee house now stands. * * * * * *

Mr. Stevenson then lived on the northeast corner of Penn Street and Wayne Street (now Tenth Street). It was bounded by Tenth Street, Wayne Street, the canal and the river. * * * * * * * * * *

He was not a married man—was never married. His colored people kept his house, Ralph and Peggy. Mr. Stevenson was in the drug business for many years. He was quite a politician—a Democrat. He was in Congress for four years. Mr. Stevenson and my father were great friends as neighbors, though they differed in politics.

I was acquainted with Amanda Stephens. Mr. Ogden was her guardian. Amanda Stephens was reputed to be the daughter of James S. Stevenson. She always bore his name. It was generally known that she was his illegal daughter. I knew Mrs. Ogden very well.

Q. Did Mrs. Ogden ever tell you of a promise that Mr. Stevenson had exacted of Mrs. Ogden respecting Amanda?

A. Yes. Not to let Amanda's mother see Amanda if she came. Amanda lived with the Ogden's when she was a young lady and went to school with Ogden's daughter in New York. Miss Ogden is now Mrs. Elizabeth Russell. I do not know her age when she went to live with the Oogden's but she was, I think, a school girl.

Amanda married a Mr. Haight, who, I think, lived in New York, and made her acquaintance while she was there

at school. The marriage ceremony was performed in Mr. Ogden's house. My father, Dr. Herron, performed the ceremony."

Second: The learned court below erred in holding and ruling that the following deposition of Mrs. Elizabeth S. Russell, admitted as evidence at the trial of this case, was not competent evidence to establish the fact that Amanda Stephens was the natural daughter of James S. Stevenson, to wit:

Deposition of Mrs. Elizabeth S. Russell, in part, as follows:

"Q. Mrs. Russell, you are a resident of the City of Pittsburgh, are you not?

A. Yes, sir.

Q. How long have you resided in Pittsburgh?

A. Since 1826.

Q. Will you please give us your age?

A. I suppose that would make me sixty-eight.

Q. You were born in 1826?

A. Yes, sir.

Q. What was your maiden name?

A. Elizabeth Ogden.

Q. You were the daughter of whom?

A. George and Elizabeth Ogden.

Q. Did you know Amanda Stephens?

A. Yes.

Q. Do you know when you first became acquainted with Amanda Stephens?

A. I think she was about five years old; I can't exactly tell, but I think so.

Q. Do you know whether your father was guardian of Amanda Stephens?

A. He was always supposed to be.

Q. He was?

A. Yes, sir.

Q. Did Amanda Stephens make her home in your family?

A. Yes, sir.

Q. Can you give about the date when she first came to live with you, Mrs. Russell?

A. I don't remember that; we were all little children; I don't know that I could give it.

Q. You know about how old you were?

A. Yes; I don't think there was much difference in our ages.

Q. Do you know about how old you were when she came to live in your family?

A. I don't think I was more than 5 or 6.

Q. Do you know how she came to reside in your family?

A. Yes, sir; she came, I remember—

By Mr. Scott:

Q. Do you know of your own knowledge?

A. From the hearing of my mother. She was brought down there to see Mr. Thaw and my grandfather and Mr. Avery—I have heard my mother say this—from the Nunnery, where she was at that time, and they thought, in consideration of this estate, better to have her reared carefully in the faith, the Protestant faith, and my mother, against her wishes, was persuaded to take her with that view; I have heard my mother say that, and she (my mother) was a very zealous Christian herself.

Q. Now, when you speak of the estate, you mean in consideration of the estate she got from James Stevenson?

A. Yes.

Q. Do you know whether or not Mr. Thaw and Mr. Snowden and Mr. Avery were the executors of James S. Stevenson's will?

A. Always heard so.

Q. And it was, then, because of their executorship that she was brought down to see them?

A. Yes, they wanted to see this child; you know she was a remarkably beautiful child.

Q. How long did Amanda live in your family?

A. Until after she was 21; until she was married.

Q. That was then, about the fall of 1847, wasn't it?

A. She was married December 2d, 1847.

Q. Was she married at your house?

A. At our house.

Q. Do you know who performed the marriage ceremony?

A. Old Dr. Herron.

Q. And she was married to whom?

A. Samuel Haight.

Q. Now, while she resided at your house, was she considered as a member of your family?

A. Oh, yes.

Q. By all?

A. By all concerned.

Q. Was she sent to school from your house?

A. Oh, yes, to the best.

Q. Where, if you please?

A. Do you want to know all the different schools?

Q. No, not all.

A. The first school I forget, but the last schools were Mrs. Macleod's, then afterwards to Staten Island, under the name of Mrs. Ingliss' school, mother of Mrs. Macleod.

Q. You went with her to that school?

A. Yes, we all went together, my sisters and myself.

Q. Did you ever hear your mother or your father make any declaration respecting the pedigree of Amanda?

A. Only by hearing that she was Mr. Stevenson's daughter.

Q. Who did you hear say that?

A. I have heard my mother discuss it; the fact is, she told Mrs. Haight when she was a young girl, because she thought it was necessary for her to know.

Q. Told her what?

A. Told her that Mr. Stevenson was ner father. When

she was married Mr. Haight was informed of that fact, and he knew it quite well.

Q. According to your information, then, James Stevenson was not a married man?

A. Never heard of his marrying. I think Mrs. Smith could tell you that; she belongs to a generation preceding mine.

Q. I believe your father and Mr. Stevenson were associated in business, were they?

A. Yes.

Q. What sort of business?

A. Wholesale drug business and lead business; first lead business ever west of the mountains.

Q. Then, your mother did tell you that Amanda Stephens was the illegal child of James S. Stevenson?

A. She told her herself.

Q. She told you too, did she not?

A. Just mentioned it in a casual sort of a way before her to her.

Q. Were you present when she told this to Amanda Stephens?

A. I forget that; it was always an accepted fact that she was.

Q. It was always an accepted fact among the members of your family that she was?

A. Yes.

Cross-Examination by Mr. Scott:

Q. Your father and mother, of course, are both dead?

A. Yes.

Q. Many years since?

A. My mother only six years ago.

THIRD. The learned Court below erred in holding and ruling that the following records, in re estate of Amanda Stevens, minor, certified under the seal of the Orphans' Court of Allegheny county, and admitted as evidence in the

trial of this case, were not competent evidence to establish the fact that Amanda Stephens was the natural daughter of James S. Stevenson, to wit:

"The petition of Amanda Stephens, a minor child, under the age of fourteen years, by her next friend, John M. Snowden, Jr., respectfully represents:

"That the petitioner is under the age of fourteen years, and has no person legally qualified and authorized to take care of her person and estate. She therefore prays the Court to appoint some suitable person for that purpose.

"JOHN M. SNOWDEN, JR.,

"For Amanda Stephens."

"I am willing to serve as the guardian of the within named Amanda Stephens, if appointed by the Court to that office." GEORGE OGDEN.

PITTSBURG, November 7, 1831.

October sessions, 1831, the petitioner makes choice with leave of the Court, George Ogden, guardian, bail in $7,000 to be given by the guardian in this case.

WILLIAM MCCLURE, Clerk.

NOVEMBER 8, 1831.

Bond approved by the Court November 11, 1831.

WILLIAM MCCLURE, Clerk.

I acknowledge to have received from my guardian, George Ogden, satisfaction in full of the amount reported as being due by him by his guardian account filed.

AMANDA HAIGHT,

APRIL 28, 1848. Formerly Amanda Stevenson.

FOURTH: The learned Court below erred in not finding as a fact from the above stated depositions and records, set forth in the first, second and third assignments of error, that Amanda Stephens was the natural daughter of James S. Stevenson.

FIFTH. The learned Court below erred in finding as follows:

"And now, August 2, 1895, upon due consideration, the Court finds for the defendants; and it is ordered that judgment be entered in their favor."

SIXTH. The learned Court below erred in opinion in this case in finding for the defendants, and in ordering judgments to be entered in their favor.

SEVENTH. The learned Court below erred in not finding for the plaintiffs and giving judgment in their favor.

Wherefore, the said Samuel Whitehill Barber, and others, above named plaintiffs, pray that the judgment of the said Circuit Court of the United States for the Western District of Pennsylvania, may be reversed, and that judgment may be entered in their favor.

JOHN S. FERGUSON,
S. DUFFIELD MITCHELL,
Attorneys for Plaintiffs.

AGREEMENT OF COUNSEL.

It is agreed between the parties to the above stated suit by their respective counsel, as follows, viz.:

That Eliza Whitlock Haight, daughter of Amanda Haight, named in the will of James S. Stevenson as Amanda Stevens, devisee of lots, 67, 98, 69 and 70, for which the above suit in ejectment has been brought, intermarried with Alfred Brames Hall, of London, England, and died on June 16, 1888, without issue her surviving; that a certified copy of the depositions of witnesses, taken before Jesse Stearns, Esq., of New York City, Commissioner, and of the depositions of witnesses taken before Gibbons Gray Cornwell, Esq., Notary Public, at West Chester, Pennsylvania, on April 13th, 1894, with the exhibits attached thereto, all of which depositions were legally and regularly taken under the rules of Court of Common Pleas of Allegheny County, and filed among the records of the suit of S. D. Mitchell, admr., etc.,

vs. Pgh., Ft. W. & Ch. Ry. Co. et al., in the Court of Common Pleas No. 2 of Allegheny County, No. 687, April Term, 1893, may be offered in evidence by the plaintiffs at the trial of the above case, No. 10, May Term, 1895, subject, however, to the right of defendants' counsel to object to the relevancy or materiality of the matters deposed to in said depositions; that the said suit, No. 687, April Term, 1893, was an ejectment suit for the same premises, described in the ejectment writ in the above No. 10, May Term, 1895, in which S. D. Mitchell, admr., d. b. n. c. t. a. of James S. Stevenson, deceased, was the plaintiff (the above named Samuel Whitehill Barber, et al., plaintiffs in said suit, No. 10, May Term, 1895, being the equitable or beneficial plaintiffs therein), and the above named Pgh., Ft. W. & Ch. Ry. Company and Pennsylvania Company, Lessee, were the defendants; and that a special verdict, a copy of which is hereto attached, was found by the jury empaneled in No. 687, April Term, 1893, in favor of the plaintiff, subject to a reserved question of law, upon which judgment was afterwards entered by the said Court of Common Pleas in favor of the defendants above named, which judgment was upon appeal to the Supreme Court of Pennsylvania affimed. (Reported in 165, Pa. 645). And it is agreed that the facts found by said special verdict may be used as evidence on the trial of the above stated case by either party, without prejudice, however, to the right of either party to give in evidence such other facts as may be relevant or material.

Witness our hand this 2nd day of May, 1895.

S. D. Mitchell,
Counsel for plaintiffs.
Watson & McCleave,
Counsel for Pgh., Ft. W. & Ch. Ry. Co.
Scott & Gordon,
Counsel for Pennsylvania Company.

VERDICT OF THE JURY.

We, the jury, duly sworn and empaneled to try the above stated case, do find for the plaintiff for the land described in the writ, with six and one-fourth cents damages and costs, subject to the opinion of the Court on the question of law reserved, to wit, we find:

FIRST. At and immediately before the time of his death, to wit, October 16th, 1831, James S. Stevenson was seized in fee simple, inter alia, of the land described in the writ in this case.

SECOND. Said James S. Stevenson, in and by his last will, dated March 11, 1831, registered in Allegheny County, in Will Book No. 3, Page 550, devised said land as follows: "I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69 and 70 in the City of Pittsburgh, in their full extent, bounded by Penn Street, Wayne Street, the Allegheny River, and lot 71. Said Amanda Stephens is now five years old (born April 7, 1826,) ..... Stephens and ..... , his wife, the parents of Amanda's mother, live near Connellsville, Fayette County, Pennsylvania.

"In the event of Amanda dying unmarried, or if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Pennsylvania." And for greater certainty we incorporate the whole of said will as part of this finding of facts.

THIRD. Said Amanda Stephens survived said James S. Stevenson, and in November, 1847, intermarried with Samuel Haight, and afterwards had offspring by her said husband.

FOURTH. Said Amanda and her said husband, Samuel Haight, by deed, dated July 27, 1848, recorded in Allegheny

County, in Deed Book Val. 84, page 154, granted and conveyed said land to Jacob Haight in trust, to reconvey the same to the said Samuel Haight, and said deed declared their intention to debar any estate tail, which they had in said lands. Said deed was, on November 3, 1848, presented in open court and it was thereupon ordered that the same be recorded in the manner commonly used in respect to sheriff's deeds, and the same was so recorded.

FIFTH. Said Jacob Haight, by deed dated ————, 1848, and recorded in Deed Book Vol. 84, page 156, granted and conveyed said land to said Samuel Haight, his heirs and assigns.

SIXTH. Said Samuel Haight and said Amanda his wife, by deed, dated March 14, 1855, recorded in the Recorder's Office of Allegheny County, in Deed Book Vol. 117, page 528, conveyed a part of the land described in the writ to James McCully, his heirs and assigns.

SEVENTH. Said James McCully, by deed, dated June 29, 1864, recorded in Deed Book Vol. 184, page 48, granted and conveyed the same part of said land to The Pittsburgh, Fort Wayne & Chicago Railway Company, one of the defendants in this case, its successors and assigns.

EIGHTH. Said Samuel Haight and Amanda, his wife, by deed, dated April 10, 1857, recorded in Deed Book Vol. 129, page 488, conveyed the residue of the land, described in the writ in this case, to The Pittsburgh, Fort Wayne & Chicago Railroad Company, its successors and assigns.

NINTH. By sundry legal proceedings and assurances the title of The Pittsburgh, Fort Wayne & Chicago Railway Company to the land conveyed to it as aforesaid by said Samuel Haight, and Amanda his wife, became vested in The Pittsburgh, Fort Wayne & Chicago Railway Company, its successors and assigns.

TENTH. The said Pittsburgh, Fort Wayne & Chicago Railway Company, by lease, dated June 7th, 1869, recorded

in Deed Book Vol. 250, page 82, demised and let unto the Pennsylvania Railroad Company the land, described in the writ in this case, for the term of 999 years from July 1, 1869.

ELEVENTH. Said Pennsylvania Railroad Company, by an assignment, dated April 1, 1873, recorded in Deed Book Vol. 772, page 43, assigned and transferred said lease and leasehold estate thereby created, unto the Pennsylvania Company, the other defendant in this case.

TWELFTH. Said Amanda Stephens married but once, her husband being Samuel Haight, hereinbefore mentioned, and by tho said marriage said Amanda had offspring, to-wit: Edward Graham Haight, born January 5th, 1849, who died December 28th, 1888; Ogden Haight, born May 8th, 1850, who died March 29th, 1891; Eliza Whitlock Haight, born December 27th, 1851, who married Alfred Brames Hall, of England, and died June 16th, 1888; Cornelia Cooper Haight, born January 18th, 1852, who died November 29th, 1860, and Susan Josephine White Haight, born October 21st, 1858, who died September 18th, 1861. None of said children left to survive them, or ever had any children.

THIRTEENTH. Said Amanda Stephens, so intermarried with Samuel Haight, died September 28th, 1891, and her husband Samuel Haight died November 20th, 1876.

FOURTEENTH. At the time of the death of the said James S. Stevenson, John Barber, of Columbia, Pa., named in the will of the said Stevenson, was married and had children in full life at the date of the making of said will, and at the date of the death of the said testator, to-wit: William Edwin Barber, born April 21st, 1822; Samuel Whitehill Barber, born January 22d, 1824; Elizabeth Wright Barber, born January 6th, 1826; Mary Ann Barber, born February 2d, 1828, and Emma Colton Barber, born August 6th, 1830; and subsequent to the making of the said will children were born to the said John Barber: James Stevenson Barber, born February 16th, 1832; John James Barber, born June 18th, 1833;

Harriet Amelia Barber, born November 6th, 1835. Said James Stevenson Barber died June 30th, 1832; said Harriet Amelia Barber died February 26th, 1838; and such of the other children of said John Barber as are dead have left lineal descendants surviving them. Samuel Whitehill Barber, Mary Ann Barber and Emma Colton Barber are still living. Said John Barber, the executor named in the will of said James S. Stevenson, died in the year 1868, and the plaintiff in this case has been duly and legally appointed administrator *de bonis non cum testamento annexo* of the said will of James S. Stevenson deceased.

If on this finding of facts the court be of the opinion that the plaintiff is entitled to recover judgment to be entered on the verdict in favor of the plaintiff If the court be of the opinion that the law is with the defendants, or either of them, judgment to be entered in favor of defendants *non obstante veredicto*.

EXEMPLIFICATION OF RECORD.

To the Honorable the Judges of the Orphans' Court of the County of Allegheny:

The petition of Amanda Stevens, a minor child, under the age of fourteen years, by her next friend, John M. Snowden, Jr., respectfully represents:

That the petitioner is under the age of fourteen years, and has no person legally qualified and authorized to take care of her person and estate. She therefore prays the Court to appoint some suitable person for that purpose.

JOHN M. SNOWDEN, JR.,
For Amanda Stevens.

Allegheny County, ss:

The above named John M. Snowden, Jr., being duly sworn according to law, doth depose and say that the above facts as stated are just and true, and that the value of the

personal estate coming to said Amanda Stevens, to the best of his knowledge and belief is about four or five thousand dollars.

JOHN M. SNOWDEN, JR.

Sworn and subscribed before me this 7th day of November, 1831.

SAMUEL PETTIGREW.

I am willing to serve as the guardian of the within-named Amanda Stevens if appointed by the Court to that office.

GEO. OGDEN.

PITTSBURG, Nov. 7, 1831.

October Sessions, 1831. The petitioner makes choice with leave of the Court, George Ogden, guardian, bail in $7,000 to be given by the guardian in this case.

WM. MCCLURE.

NOVEMBER 8th, 1831. Clerk.

Know All Men by These Presents:

That we, George Ogden and Charles Avery and James S. Craft, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of Seven Thousand Dollars, lawful money of the United States to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns firmly by these presents.

Sealed with our seals and dated the ninth day of November, A. D. 1831.

The condition of this obligation is such, that if the bounden George Ogden, guardian of Amanda Stevens, shall at least once every year, and whenever thereto required by the Orphans' Court of Allegheny County (according to the Acts of Assembly in such case made and provided) render a true account of the management of the property and estate of the said minor under his care and shall also deliver up the said property agreeably to the decree of the said Court or

the directions of law and shall in all respects faithfully discharge the duties of his guardianship, then this obligation shall be void, otherwise to remain in full force and virtue.

GEO. OGDEN. [Seal.]
CHARLES AVERY. [Seal.]
JAMES S. CRAFT. [Seal.]

Witness present:
SAMUEL SNOWDEN.

Bond approved by Court November 11th, 1831.

WM. MCCLURE,
Clerk.

GUARDIAN ACCOUNT OF GEORGE OGDEN, GUARDIAN OF MISS AMANDA STEVENSON.

DR.

Accountant charges himself as follows:

1847.			
Sept. 1.	To amount of cash received from the executors of James Stevenson, and from rents of real estate devised to said Amanda, from January 4th, 1832, to date - - - - - -	$16,522	25
	To interest on monies received -	1,500	00
		$18,022	25
	To balance due by Accountant September 1, 1847 - - -	$ 4,241	57
Sept. 14.	By Cash *prout* receipt of Miss Stevenson - - - - - -	1,000	00
	Balance due by Accountant -	$ 3,241	57

And claims credit, as follows, viz:

1847.

Sept. 1.	By amount of sundry payments made for support, maintenance and education of Said Amanda, including boarding to September, 1847 - -	$13,774	68
	By cash paid Register passing this account - - - - - -	6	00
	By balance due by Accountant -	4,241	57
		$18,022	25

To P. A. MADEIRA, ESQ.,
Register:

You will please place the above account on record, as a settlement of all accounts between me and my guardian, Mr. George Ogden, the items composing said account having been exhibited and fully explained to me and I being entirely satisfied therewith.

AMANDA STEVENSON.

September 14, 1847.

Exhibited into the Register's office Sept. 15th, 1847.
GEORGE OGDEN.

Sworn to and subscribed before me Sept. 15th, 1847.
P. A. MADEIRA,
Reg'r.

IN THE ORPHANS' COURT OF ALLEGHENY COUNTY.

In the Matter of the Guardian Account of George Ogden, Guardian of Amanda Stevenson.

I acknowledge to have received from my guardian, George Ogden, satisfaction in full of the amount reported as being due by him by his guardian account filed.

AMANDA HAIGHT,
Formerly Amanda Stevenson.

April 28, '48.

Oct. 25, 1847. Confirmed *Nisi*.
By the Court.

Nov. 15, 1848. Presented in open Court and confirmed absolutely.

By the Court.
JOHN YOUNG, JR.,
Clerk.

State of Pennsylvania, } ss.
Allegheny County. }

I, Samuel P. Conner, Register of Wills, and ex-officio Clerk of the Orphan's Court, in and for said county and State, do hereby [SEAL] certify that the foregoing and annexed pages contain a true copy and correct transcript of the record and proceedings in said stated case, at Nos. 35, October term, 1831, and 41, October term, 1847, in the Orphans Court of said county, so full and entire as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said Court, at Pittsburgh, this 29th day of March, 1895. SAMUEL P. CONNER.

Register, and Ex-officio Clerk of Orphans' Court.

COPY OF WILL.

I, James S. Stevenson, of the city of Pittsburgh, in the State of Pennsylvania, aged fifty years on the 12th day of January, 1831, reflecting on the certainty of death and desirous of making a distribution of my property in the event of my decease, do hereby declare this writing to be my Last Will and Testament, made this twelfth day of March, in the year of our Lord, one thousand eight hundred and thirty-one.

I give and bequeath to Amanda Stephens, daughter of Margaret Stephens lots 67, 68, 69 and 70, in the city of Pittsburg, in their full extent, bounded by Penn street, Wayne street, the Allegheny river, and by lot 71. Said Amanda Stephens is now five years old (born April 7, 1826).

..... Stephens and ....., his wife, the parents of Amanda's mother, live near Connellsville, in Fayette county, Pennsylvania.

In the event of Amanda dying unmarried, or if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Penn'a.

I give and bequeath to John Barber, of Columbia, and to his heirs the lots in the city of Pittsburgh numbered 71 and 72, bounded by Penn street, by lot 70, by the Allegheny river and by lot 73.

I give and bequeath to Mary Livingston's children the lot 74, in the city of Pittsburgh. And to her unmarried sister, Eliza Stevenson, I give and bequeath the lot 73, in the city of Pittsburgh, and in the event of her death the lot to go to her sister's children. Mary Livingston and Eliza Stevenson are daughters of the late Colonel S. Stevenson, son of Robert Stevenson, of York county, Pa.

I give and bequeth to the sons of James Stevenson, formerly of York County, but who died in Lycoming County in 1810 or 1811, the brick and other buildings with the ground on which they are erected situated at the corner of Wood and Fifth Streets, Pittsburgh. Those sons are Stephen, Manning, Ruben, Samuel and I. Stephenson.

All the remainder of my property to be sold and after paying my debts to be divided into sixteen shares and to be disposed of as follows: To Amanda Stephens one share, to Mary Livingston one share, to Eliza Stevenson one share, to Stephen Stevenson, within named, one share, to James Wright, of Columbia, or his heirs two shares, to John Barber, of Columbia, two shares, to Ann Elliott, formerly Ann West, now wife of Rev. Mr. Elliott, of Washington County, one share, to Jane E. Theckor, niece of the late Rev. Mr. Kerr, one-sixteenth (or one shure), to the heirs of John Barber, of Columbia, two shares, to the heirs of James Wright, of Columbia, two shares, to Charles Avery, J. M. Snowden and John Thaw, to be divided equally, two shares.

I hereby constitute and appoint the said Charles Avery, J. M. Snowdon and John Thaw and John Barber the executors of this my will.

Signed at Pittsburgh this 11th day of March, 1831.

JAS. S. STEVENSON.

Witness:

GEO. OGDEN.

J. S. CRAFT.

Allegheny County, ss.

On the 18th day of October, A. D. 1831, personally appeared before me, John M. Snowden, Register for the Probate of Wills, etc., in and for said county, George Ogden and James S. Craft, the two subscribing witnesses to the foregoing will, who being severally and solemnly sworn did depose and say, that on the 16th inst., a few hours before the decease of the testator they were present with him, that he ordered the foregoing instrument of writing to be brought to him; that he read it over; that he declared it in their presence as and for his last will and testament; that he requested them to sign it as witnesses; that they did sign it as witnesses in his presence, and in the presence of each other, and that he directed it to be enclosed in an envelope and requested it to be marked as his last will and testament; that the will was drawn up and signed by the deceased before it was exhibited to deponents for their signatures as witnesses; that they are well acquainted with the handwriting of the deceased and have frequently seen him write, and the said last will and testament and signatures thereto, together with the endorsement on the back thereof is in the proper handwriting of the said James S. Stevenson, deceased. And, further, that according to the best of their knowledge, observation and belief, the testator at the time he requested the deponents to sign the same as witnesses was of perfect and sound mind, memory and understanding.

JOHN M. SNOWDEN,
Register.

State of Pennsylvania,
Allegheny County. } *ss.*

I, Samuel P. Connor, Register of Wills, etc., in and for said County, do hereby certify, the foregoing to be a true and correct copy of the original last will and testament, and probate annexed of James S. Stevenson, deceased, as the same remains on file and is of record in my office, in Will Book Vol. 3, page 550.

[SEAL.]

Witness my hand and seal of said office, at Pittsburgh, this 25th day of March, A. D., 1895.

SAM'L P. CONNER,
Register.

Commonwealth of Pennsylvania,
Allegheny County. } *ss.*

I, Samuel P. Connor, Register for the Probate of Wills granting letters of administration, etc., in and for the County aforesaid, do hereby certify, that on the 1st day of November, A. D., 1831, letters testamentary on the estate of James S. Stevenson, deceased, late of Pittsburgh, County aforesaid, were duly granted unto Charles Avery, John M. Snowden and John Thaw, and on July 23d, 1832, to John Barber, who were duly qualified, well and truly to administer the goods and chattels, rights and credits which were of said decedent. Therefore, all faith and credit are of right due, and ought to be paid to all their lawful acts as such throughout the United States and elsewhere.

[SEAL.]

Given under my hand and seal of office at Pittsburgh, this 25th day of March, A. D., 1895.

SAM'L P. CONNER,
Register.

DEPOSITION OF MARY B. SMITH.

It is agreed by and between the parties hereto by their respective counsel, who have subscribed hereto, that the deposition of Mrs. Mary B. Smith, of Leet Township, Allegheny County, Pennsylvania, an aged and infirm witness, produced on the part of the plaintiffs, shall be taken at her residence at Shields Station, on Pgh., Ft. W. & Ch. Ry., between the hours of one and six o'clock, p. m., on February 25, 1895, before Wm. T. Lindsey, Esq., Clerk of the U. S. District Court, and U. S. Commissioner, residing at the City of Pittsburgh, upon oral interrogatories propounded to her by respective counsel, subject to objections to be made to the above Court as to competency or relevancy of the facts deposed to. In taking such deposition the Commissioner shall not be required to write the questions propounded, but shall reduce to writing the answers thereto in such manner as to give the exact substantial testimony given, the defendants not hereby waiving any right to object to the jurisdiction of the Court.

Witness our hands this February 25, A. D., 1895.

S. D. MITCHELL,
Counsel for Plaintiffs.

WATSON & MCCLEAVE,
Counsel for Pgh., Ft. W. & Ch. Ry. Co

SCOTT & GORDON,
Counsel for Penn'a Comany.

DEPOSITION OF MARY BLAINE SMITH.

Of Leet Township, Allegheny County, Pennsylvania, an aged and infirm witness, produced on part of plaintiffs, as per agreement of counsel for parties in interest herein hereto attached, before William T. Lindsey, a Commissioner of the Circuit Court of the United States, for the Western District of Pennsylvania, between the hours of one and six

o'clock p. m., Monday, February 25, 1895, the said plaintiffs being represented by S. D. Mitchell, Esq., and the defendants by James Pierce, Esq., representing Watson & McCleave, counsel for the P., Ft. W. & C. R. R. Co., and by Walter Scott, Esq., representing Scott & Gordon, of counsel for the Penn'a Company.

Mary Blaine Smith, being duly sworn, and being examined by Mr. Mitchell, of counsel for plaintiffs, says:

I was born in November, 1803, in Shippensburg, then Franklin, but now Cumberland County, Pennsylvania.

I came to Pittsburgh, to live, in 1810.

My father's name was Francis Herron, a clergyman, and pastor of the First Presbyterian Church, Pittsburgh.

When we first case to Pittsburgh we lived at the corner of Penn and Marberry streets. We lived there about two years. My father then built a house at the corner of Tenth (Wayne street) and Penn, to which we moved. The house was on the corner where Dilworth's coffee house now stand.

Q. Who lived on the opposite side of Wayne street from where you lived and on the same side of Penn?

Objected to as incompetent and irrelevant.

A. James S. Stevenson.

The plaintiff offers to prove by the witness, first, that she knew James S. Stevenson for a number of years prior to his death and up to the time of his death; that she lived a near neighbor to him; that she knew the duration of his last sickness and the nature of the disease of which he died; that at the time of making and publishing his will he was in immediate expectation of death, and died a few hours thereafter; and, further, that Amanda Stephens, the devisee named in James S. Stevenson's will, was the natural daughter of James S. Stevenson; and so recognized by him.

Objected to as incompetent, irrelevant, and immaterial, and also object to all evidence that tends to support said offer as incompetent, irrelevant and immaterial.

Mr. Stevenson then lived on the northeast corner of Penn street and Wayne street (now Tenth street.) It was bounded by Penn street, Wayne street, the canal and the river. I have always understood that railroad buildings are on that property now—the property of Mr. Stevenson. Mr. Stevenson's house was located about the center of the lot. He lived there a great many years and was living there when he died.

He was not a married man—was never married. His colored people kept his house—Ralph and Peggy.

Mr. Stevenson was in the drug business for many years. He was quite a politician—a Democrat. He was in Congress for four years. Mr. Stevenson and my father were great friends as neighbors, though they differed in politics.

I remember very well Mr. Stevenson's last sickness. He was very sick from the first with typhus, now called typhoid fever. He was sick two (2) weeks—died in the second week of his sickness. I think it was Dr. Mowry who attended him. I think I am right in that—not wrong. He was seriously ill all the time, at least the physicians said he was. After the first week there was no expectation of his recovery.

On the last week, a few days before his death, the physicians informed him of his condition.

My mother was there many times during the last week of his sickness, but was not there at his death, but was informed of his death soon after by the colored man, Ralph. Mother was at his house the day of his death—was there to see if all things were right. He died in October, but I do not remember the year.

I do not remember when he made his will. I heard that Mr: Ogden and Mr. Craft were witnesses to his will a short time before his death. I mean that they signed as witnesses a short time before his death.

I was acquainted with Amanda Stephens. Mr. Ogden was her guardian. Amanda Stephens was reputed to be the daughter of James S. Stevenson. She always bore his name. It was generally known that she was his illegal daughter.

I knew Mrs. Ogden very well.

Q. Did Mrs. Ogden ever tell you of a promise that Mr. Stevenson had exacted of Mrs. Ogden respecting Amanda?

A. Yes; not to let Amanda's mother see Amanda if she came.

Amanda lived with the Ogdens when she was a young lady and went to school with Ogden's daughter in New York. Miss Ogden is now Mrs. Elizabeth Russell. I do not know her age when she went to live with the Ogdens, but she was, I think, a school girl.

Amanda married a Mr. Haight, who, I think, lived in New York, and made his acquaintance while she was there at school. The marriage ceremony was performed in Mr. Ogden's house My father, Dr. Herron, performed the ceremony.

Cross-examination.

I did not see Mr. Stevenson during his last sickness, but my mother saw him then. It was generally gentlemen who were there with him. I was at his house during his sickness —had to go very often.

I heard many persons say that he could not recover, and the doctors said, in the last week of his sickness, that he could not recover, was dangerously sick. The doctor told my mother, which was the same thing as telling me, for we were almost one, both being much interested in him, he being a most excellent neighbor.

I heard my mother say two days before he died that the docter had informed him of his inability to recover.

Of my own knowledge I do not know who were the witnesses to Mr. Stevenson's will.

I know he made a will, but not when he made it.

I think that Mr. Ogden and Mr. Craft were both present when Mr. Stevenson died. That is what I heard.

I never saw Mr. Stevenson's will. I only know Mr. Ogden and Mr. Craft were witnesses from report—hearsay.

I have seen the railroad building standing on the Stevenson property—think they are the Fort Wayne buildings.

I never heard that Amanda Stephenson was the daughter of any other person than James S. Stevenson.

I was about 28 years old when Mr. Stevenson died. My recollection is very good as to things that occurred about the time of Mr. Stevenson's death.

MARY BLAINE SMITH.

Witness:

WM. T. LINDSAY.

United States of America,
Western District of Pennsylvania, } *ss.*

I, William T. Lindsay, specially commissioned by the Circuit Court of the United States, for the Western District of Pennsylvania, in the Third Judicial Circuit, to take depositions under and by virtue of the Acts of Congress, do hereby certify that on the day herein above stated, at Shields Station, Allegheny County, Pennsylvania, I was attended by Mary Blaine Smith, who was of sound mind and lawful age; and the said witness having been by me carefully examined, cautioned and sworn to testify to the truth, the whole truth and nothing but the truth, the foregoing deposition was reduced to writing by me, in the presence of the witness who subscribed the same in my presence.

I further certify, that the reason for taking the said deposition, and the fact is that the said witness was aged and infirm, and the said deposition was taken in pursuance of the Act of Congress in such case made and provided, and the agreement of counsel hereto attached.

I further certify, that I have retained the said deposition in my possession until the same was sealed up for transmission under my seal to the Court for which the same was taken, together with this certificate of the reasons for the taking thereof.

I further certify, that I am not of counsel or attorney for either of the parties to the said cause, or in any manner interested in the event of the same.

In testimony whereof, witness my hand and seal, this 25th day of February, A. D. 1895.

WM. T. LINDSAY,
Special Commissioner.
United States Commissioner Western District of Pa.

IN THE CIRCUIT COURT OF THE UNITED STATES, WESTERN DISTRICT OF PENNSYLVANIA.

SAMUEL WHITEHILL BARBER *et al.*

vs.

THE PITTSBURGH, FT. WAYNE AND CHICAGO RAILWAY COMPANY AND THE PENNSYLVANIA COMPANY, LESSEE.

No. 10, May Term, 1895.

DEPOSITION OF MRS. E. S. RUSSELL.

It is hereby agreed by and between the counsel in interest in the above stated case that the deposition of Mrs. E. S. Russell be taken before Miss Christine Newell, Notary Public, on the 10th day of May, 1895, subject to all objections as to competency and relevancy of the facts deposed to, which deposition may be offered in evidence at the trial of said case with the same effect as if said witness were produced and sworn in person at said trial, and that said deposition be taken by a stenographer and afterwards reduced to type-writing, and subsequently signed by the witness with

the same effect as if taken by the Notary at length, read over to the witness and signed by her immediately thereafter.

S. D. MITCHELL,
Attorney for Plaintif.
WATSON & MCLEAVE,
SCOTT & GORDON,
Attorneys for Defendant.

And now, to wit, Pittsburgh, Pa., May 10, 1895, pursuant to foregoing agreement of counsel, the deposition of Mrs. E. S. Russell was taken before Miss Christine Newell, Notary Public, as follows:

Present: S. D. Mitchell, Esq., counsel for plaintiff, and William Scott, of counsel for defendant.

MRS. ELIZABETH S. RUSSELL, being first duly sworn, testified as follows:

Direct Examination by Mr. Mitchell:

Q. Mrs. Russell, you are a resident of the city of Pittsburgh, are you not?

A. Yes, sir.

Q. How long have you resided in Pittsburgh?

A. Since 1826.

Q. Will you please give us your age?

A. I suppose that would make me 68.

Q. You were born in 1826?

A. Yes, sir.

Q. What was your maiden name?

A. Elizabeth Ogden.

Q. You were the daughter of whom?

A. George and Elizabeth Ogden.

Q. Did you know Amanda Stephens?

A. Yes.

Q. Do you know when you first became acquainted with Amanda Stephens?

A. I think she was about five years old; I can't exactly tell, but I think so.

Counsel for defendant asks counsel for plaintiffs to make an offer of what he proposes to prove by the witness.

Counsel for plaintiff proposes to prove by the witness that she was the daughter of George Ogden, who was a witness to the will of James S. Stevenson; that the said George Ogden was guardian of Amanda Stephens, afterwards Amanda Haight, mentioned in the will of Stevenson as devisee of the lots in controversy in the above stated case; that the said Amanda Stephens, after the death of James S. Stevenson, in 1831, was taken into the family of George Ogden and reared by them, and to prove the declarations of Elizabeth Ogden, the mother of the witness, that the said Amanda Stephens was the illegal daughter of James S. Stevenson.

Defendant's counsel, not waiving the right of objection otherwise under the agreement of counsel to this deposition, or any part thereof specifically, objects to the whole of the testimony proposed to be adduced under the foregoing offer as incompetent and irrelevant to any issue raised in the case.

By Mr. Mitchell:

Q. Do you know whether your father was guardian of Amanda Stephens?

A. He was always supposed to be.

Q. He was?

A. Yes, sir.

Q. Did Amanda Stephens make her home in your family?

A. Yes, sir.

Q. Can you give about the date when she first came to live with you, Mrs. Russell?

A. I don't remember that; we were all little children; I don't know that I could give it.

Q. You know about how old you were?

A. Yes; I don't think there was much difference in our ages.

Q. Do you know about how old you were when she came to live in your family?

A. I don't think I was more than 5 or 6.

Q. Do you know how she came to reside in your family?

A. Yes, sir; she came, I remember—

By Mr. Scott:

Q. Do you know of your own knowledge?

A. From the hearing of my mother. She was brought down there to see Mr. Thaw and my grandfather and Mr. Avery—I have heard my mother say this—from the Nunnery, where she was at that time, and they thought, in consideration of this estate, better to have her reared carefully in the faith, the Protestant faith, and my mother, against her wishes, was persuaded to take her with that view; I have heard my mother say that, and she (my mother) was a very zealous Christian herself.

Q. Now, when you speak of the estate, you mean in consideration of the estate she got from James Stevenson?

A. Yes.

Q. Do you know whether or not Mr. Thaw and Mr. Snowden and Mr. Avery were the executors of James S. Stevenson's will?

A. Always heard so.

Q. And it was then because of their executorship that she was brought down to see them?

A. Yes; they wanted to see this child; you know she was a remarkably beautiful child.

Q. How long did Amanda live in your family?

A. Until she was twenty-one—until she was married.

Q. That was, then, about the Fall of 1847, wasn't it?

A. She was married December 2d, 1847.

Q. Was she married at your house?

A. At our house.

Q. Do you know who performed the marriage ceremony?

A. Old Doctor Herron.

Q. And she was married to whom?

A. Samuel Haight.

Q. Now, while she resided at your house, was she considered as a member of your family?

A. Oh, yes.

Q. By all?

A. By all concerned.

Q. Was she sent to school from your house?

A. Oh, yes, to the best.

Q. Where, if you please?

A. Do you want to know all the different schools?

Q. No, not all.

A. The first school I forget, but the last schools were, Mrs. Macleod, then afterwards to Staten Island, under the name of Mrs. Ingliss' school, mother of Mrs. Macleod.

Q. You went with her to that school?

A. Yes; we all went together, my sisters and myself.

Q. Did you ever hear your mother or your father make any declarations respecting the pedigree of Amanda?

A. Only by hearsay that she was Mr. Stevenson's daughter.

Q. Whom did you hear say that?

A. I have heard my mother discuss it; the fact is, she told Mrs. Haight when she was a young girl, because she thought it was necessary for her to know.

Q. Told her what?

A. Told her that Mr. Stevenson was her father. When she was married Mr. Haight was informed of that fact, and he knew it quite well.

Q. According to your information, then, James Stevenson was not a married man?

A. Never heard of his marriage. I think Mrs. Smith could tell you that; she belongs to a generation preceding mine.

Q. I believe your father and Mr. Stevenson were associated in business, were they?

A. Yes.

Q. What sort of business?

A. Wholesale drug business and the lead business; first lead business ever west of the mountains.

Q. Then your mother did tell you that Amanda Stephens was the illegal child of James S. Stevenson?

A. She told her herself.

Q. She told you too, did she not?

A. Just mentioned it in a casual sort of a way before her to her.

Q. Were you present when she told this to Amanda Stephens?

A. I forget that; it was always an accepted fact that she was.

Q. It was always an accepted fact among the members of your family that she was?

A. Yes.

Cross-examination by Mr Scott:

Q. Your father and mother, of course, are both dead?

A. Yes.

Q. Many years since?

A. My mother only six years ago.

Q. Do you have any personal recollection yourself of James S. Stevenson?

A. No.

Q. He died when you were a small child?

A. Must have.

Q. You have no recollections of him?

A. Not the slightest.

Q. You have no particular personal recollection of matters which occurred when you were five or six years old?

A. No.

Q. Have you any recollection of your own as to the

coming of Amanda Stephens to your house, or is your statement here simply what you were afterwards told by your mother or father?

A. Yes; I will tell you why; because we were all ill with the measles, and she came down and complained of feeling ill, and was taken with the measles and had to stay there and be nursed and that is the way she won her way into my mother's regard.

Q. Do you recollect these matters yourself, or do you give them from what was afterwards the subject of conversation in your family?

A. Yes, sir; both.

Q. Did you hear any talk when you were a child as to the parentage of Amanda Stephens, or was that a matter you heard later in life?

A. Later in life; when about 17 or 18 years of age.

Q. After you were substantially grown up?

A. Yes.

Q. And it was then, for the first time, you received this information?

A. Yes.

Q. And that statement was made to you by your mother?

A. Yes; it was considered necessary for Mrs. Haight to know it.

Q. It was from your mother that the statement came to yourself?

A. Yes, my father never made any mention of it; never spoke on the subject; he was exceedingly modest and reticent.

ELIZABETH S. RUSSELL.

State of Pennsylvania,
County of Allegheny, } *ss.*
City of Pittsburgh.

I, Christine Newell, a Notary Public in and for said State, do hereby certify that the foregoing deposition of Mrs. Elizabeth S. Russell was taken before me on Friday, May 10th, 1895, at 3:30 o'clock, P. M., at the office of Wm. Scott, Esq., in pursuance of the notice annexed hereto; that the witness was first duly sworn to testify the truth, the whole truth, and nothing but the truth, and the same was taken down by Isabel E. Edgar, Stenographer, and after the same had been type-written was read over by the said witness, who then subscribed her name thereto in my presence.

Witness my hand and Notarial seal the day and year aforesaid.

CHRISTINE NEWELL,
Notary Public.

[SEAL]

EXEMPLIFICATION OF RECORD.

Allegheny County,
The Commonwealth of Pennsylvania. } *ss.*

TO THE SHERIFF OF SAID COUNTY, GREETING: You are hereby commanded, that you summon the Pittsburgh, Fort Wayne and [SEAL.] Chicago Railway Company and the Pennsylvania Company, Lessee, to appear before the Judges of the Court of Common Pleas No. 2, in and for said County, to be holden at Pittsburgh, on the first Monday of April, 1893, then and there to answer to a certain complaint by S. Duffield Mitchell, admr. d. b. n. c. t. a. of Jas. S. Stevenson, deceased, that they, the said the P., F. W. & C. Ry. and the Pennsylvania Company, Lessee, have in their actual possession a lot of ground, situated in the Fourth Ward, City of Pittsburgh,

County of Allegheny, State of Pennsylvania, bounded and described as follows, viz.: Beginning at the north-east corner of Penn Avenue and Wayne Street, thence northwardly by line of said Wayne Street, 596⅙ feet, more or less, to Duquesne Way, thence eastwardly along the line of Duquesne Way 242 feet, more or less, to the westerly line of lot No. 71 in Wood's General Plan of Pittsburgh; thence southwardly by the line of said lot No. 71, 630 feet, more or less, to Penn Avenue, and thence by the line of Penn Avenue, 240 feet, more or less, to the place of beginning, being lots 67, 68, 69 and 70 in Wood's General Plan of Pittsburgh, upon which are erected two large brick office buildings and a frame shed or frame building, used as a freight depot, and upon which are laid and constructed railroad tracks and siding, the right of possession or title to which he, the said S. Duffield Mitchell, says is in him and not in the said defendants' all which he, the said plaintiff, avers that he is prepared to prove before our said Court. Hereof fail not.

Witness, the Honorable Thomas Ewing, President of our said Court, the 20th day of March, A. D. 1893.

JOHN BRADLEY,
Prothonotary.

We, the jury duly sworn and empaneled to try the above stated case, do find for the plaintiff for the land described in the writ, with six and one-fourth cents damages and costs subject to the opinion of the Court on the question of law reserved, to-wit, we find:

1st. At and immediately before the time of his death, to-wit, October 16, 1831, James S. Stevenson was seized in fee simple *inter alia*, of the land described in the writ in this case.

2nd. Said James S. Stevenson, in and by his last will, dated March 11, 1831, registered in Allegheny County in Will Book No. 3, page 550, devised said land as follows: "I give and bequeath to Amanda Stephens, daughter of Mar-

garet Stephens, lots 67, 68, 69 and 70, in the city of Pittsburgh, in their full extent, bounded by Penn street, Wayne street, the Allegheny river, and by lot 71. Said Amanda Stephens is now 5 years old (born April 7th, 1826.) ——— Stephens and ——— his wife, the parents of Amanda's mother, lived near Connellsville, Fayette County, Pa. In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Pennsylvania; and for greater certainty we incorporate the whole of said will as part of this finding of facts.

3rd. Said Amanda Stephens survived said James S. Stevenson, and, in November, 1847, intermarried with Samuel Haight, and afterwards had offspring by her said husband.

4th. Said Amanda and her said husband, Samuel Haight, by deed dated July 27th, 1848, recorded in Allegheny County in Deed Book vol. 84, page 154, granted and conveyed said land to Jacob Haight in trust to reconvey the same to the said Samuel Haight, and said deed declared their intention to debar any estate tail which they had in said lands. Said deed was on November 3d, 1848, presented in open Court, and it was thereupon ordered that the same be recorded in the manner commonly used in respect to sheriff's deeds, and the same was so recorded.

5th. Said Jacob Haight, by deed dated ———, 1848, and recorded in Deed Book, vol. 84, page 156, granted and conveyed said land to said Samuel Haight, his heirs and assigns.

6th. Said Samuel Haight and said Amanda, his wife, by deed dated March 14th, 1855, recorded in the Recorder's office of Allegheny County, in Deed Book, vol. 117, page 528, conveyed a part of the land described in the writ to James McCully, his heirs and assigns.

7th. Said James McCully, by deed dated June 29th,

1864, recorded in Deed Book, vol. 184, page 48, granted and conveyed the same part of said land to the Pittsburgh, Fort Wayne and Chicago Railway Company, one of the defendants in this case, its successors and assigns.

8th. Said Samuel Haight and said Amanda, his wife, by deed dated April 10, 1857, recorded in Deed Book, Vol. 129, page 488, conveyed the residue of the land described in the writ in this case to the Pittsburgh, Fort Wayne and Chicago Railway Company, its successors and assigns.

9th. By sundry legal proceedings and assurances the title of the Pittsburgh, Fort Wayne and Chicago Railway Company to the land conveyed to it as aforesaid by said Samuel Haight and Amanda, his wife, became vested in the Pittsburgh, Fort Wayne and Chicago Railway Company, its successors and assigns.

10th. The said Pittsburgh, Fort Wayne and Chicago Railway Company by lease dated June 7, 1869, recorded in Deed Book, Volume 250, page 82, demised and let unto the Pennsylvania Railroad Company the land described in the writ in this case, for the term of 999 years from July 1, 1869.

11th. Said Pennsylvania Railroad Company, by an assignment dated April 1, 1873, recorded in Deed Book, Volume 772, page 43, assigned and transferred said lease and leasehold estate thereby created unto the Pennsylvania Company, the other defendant in this case.

12th. Said Amanda Stephens married but once, her husband being Samuel Haight, hereinbefore mentioned, and by the said marriage said Amanda had offspring, to-wit: Edward Graham Haight, born January 5, 1849, who died December 28, 1888; Ogden Haight, born May 8, 1850, who died March 29, 1891; Eliza Whitlock Haight, born December 27, 1851, who married Alfred Brames Hall, of England, and died June 16, 1888; Cornelia Cooper Haight, born January 18, 1852, who died November 29, 1860, and Susan Josephine White Haight, born October 21, 1858, who died

September 18, 1861. None of said children left to survive them, or ever had any children.

13th. Said Amanda Stephens, so intermarried with Samuel Haight, died September 28, 1891, and her husband, Samuel, died November 20, 1876.

14th. At the time of the death of said James S. Stevenson, John Barber, of Columbia, Pa., named in the will of said Stevenson, was married and had children in full life at the date of the making of the said will, and at the date of the death of said testator, to-wit: William Edwin Barber, born April 21, 1822; Samuel Whithill Barber, born January 22, 1824; Elizabeth Wright Barber, born January 6, 1826; Mary Ann Barber, born February 2, 1828, and Emma Colton Barber, born August 6, 1830. And subsequent to the making of the said will, children were born to the said John Barber: James Stevenson Barber, born February 16, 1832; John James Barber, born June 18, 1833; Harriet Amelia Barber, born November 6, 1835. Said James Stevenson Barber died June 30, 1832; said Harriet Amelia Barber died February 26, 1838, and such of the other children of said John Barber as are dead have left lineal descendants surviving them. Samuel Whitehill Barber, Mary Ann Barber and Emma Colton Barber are still living. Said John Barber, the executor named in the will of said James S. Stevenson, died in the year 1868, and the plaintiff in this case has been duly and legally appointed admidistrator *de bonis non cum testamento annexo* of the said will of James S. Stevenson, deceased.

If, on this finding of facts, the Court be of the opinion that the plaintiff is entitled to recover judgment to be entered on the verdict in favor of the plaintiff. If the Court be of the opinion that the law is with the defendants, or either of them, judgment to be entered in favor of defendants *non obstante veredicto.*

OPINION BY EWING, P. J.

This case has been ably and exhaustively argued on both sides.

The question of law arises on the construction of the will of James S. Stevenson, who died October 16th, 1831, aged fifty-one years, having a few hours before his death, made his last will, dated, however, March 12th, 1831, written by himself. The original will is without punctuation, the facts as to its execution appear from the probate endorsed on the will.

THE WILL.

"I, James S. Stevenson of the City of Pittsburgh in the State of Pennsylvania age fifty years on the 12th day of January 1831, reflecting on the certainty of death and desirous of making a distribution of my property in the event of my decease do hereby declare this writing to be my last Will and Testament made this 12th day of March in the year of our Lord One thousand eight hundred and thirty-one.

"I give and bequeath to Amanda Stephens daughter of Margaret Stephens lots 67, 68, 69 and 70, in the City of Pittsburgh in their full extent bounded &c. (description includes the property in suit in this case.)

"Said Amanda Stephens is now five years old (born April 7th, 1826) ——— Stephens and ——— his wife the parents of Amanda's mother live near Connellsville, Fayette Co. Penna.

In the event of Amanda dying unmarried or if married dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber of Columbia, Penna."

John Barber, of Columbia, Pa., was named as one of the executors.

The will proceeds thereafter to make other devises and bequests specifically and contains a provision that all his re-

maining property shall be sold and the proceeds be divided among legatees named.

The Special Verdict finds that Amanda Stephens married Samuel Haight and had offspring by her husband five children, one of whom married, but all of whom died before their mother, without leaving offspring, that Samuel Haight died before his wife Amanda, who died September 28th, 1891.

Also, that if the will created an estate tail in Amanda Stephens, the entail was duly barred by deed dated July 27th, 1848, and proceedings thereon. And that by sundry *mesne* conveyances the title of Amanda Stephens freed from entail, became vested in the defendants.

The testator evidently intended to dispose of all his property. The devise to Amanda Stephens, followed by the limitations over or without them created a fee, whether in tail or contingent. The circumstances, the age of the devisee and the will, leave us in do doubt that the contingency of Amanda's death, did not mean her death before the testator.

What is the true meaning of the words "dying *without offspring by her husband*?" Legally, if not defined by other parts of the will we take offspring to mean descendants—however remote. *Thompson vs. Bailey*, 3 Drew 7; *Young vs. Davis*, 2 Dr. & Sm. 167; *Allen vs. Markell*, 36 Pa. 117.

Webster defines it, "that which is produced, especially a child or children, descendants however remote from the stock." The Century Dictionary says, "Progeny descendants however remote from the stock, issue, a collective term applied to several or all descendants."

True it may be confined to children as in *Lister vs. Tidd, Bevans* Report vol. 29, Page 618, in a division of money at death of widow. In the present case we interpret the phrase "Dying without offspring by her husband" to have the same legal effect and force as the words dying without le-

gitimate issue, or heirs of her body. They are words of limitation, not of purchase.

Does the will of James S. Stevenson refer to a definite or an indefinite failure of issue or offspring of Amanda Stevens?

To undertake to cite and still more to reconcile the numerous decisions on this general question would not only be confusing and interminable but to any clear headed lawyer it is impossible. The decisions are irreconcilable.

But there are general rules well established which govern this case. That the words "dying without issue" or without legitimate issue standing alone and uncontrolled by other parts of the will "import an indefinite failure of issue is well established and in all the departures from fundamental rules" it has not been shaken in this state. *Eichelberger vs. Barnitz* 9 Watts 447, being the leading case. Affirmed in *Middlewarth's Ad'm, vs. Blackmore*, 74, Pa. 419, and in all subsequent cases when the question has been raised. *Prima facie* then on the settled rule of interpretation this phrase in the will imports an indefinite failure of issue.

Another rule of interpretation is properly invoked by the plaintiff, to-wit, that the intention of the testator must govern and if from reading the whole will it is apparent that the testator meant and has potentially said that the devise over is to take effect in case the first taker dies leaving no issue *living at the time of her death* it is a definite failure of issue.

Middlewarth's Adm'r vs. Blackmore 74, Pa. 419, was a case of this kind where each of several provisions of the will pointed distinctly to a distribution at the death of Jonathan without issue living at his death and all these provisions taken together showed clearly and conclusively that that was the intention of the testator.

Is this such a will?

Counsel for plaintiffs have made a very ingenious argument in the affirmative and while the case is not free from

doubt they have failed to convince us that the intention of the testator was different from the ordinary legal import of the terms used in the devise.

The arguments mainly are that it must be presumed that he intended the event to occur if at all in the lifetime of his executors named who would then sell the property and divide the proceeds. Also that testator in the clause uses the words "in the *event*" of Amanda dying, &c., and that he uses these words in the preamble of his will "in the event of dying" and in the second paragraph of the will, in the event of her (Eliza Stevenson) death. In these two other cases referring to what is to be done immediately upon the death that he in declaring what was to be done in the contingency of Amanda's death must have intended at and immediately after her death. It may be he did so intend but we start with the presumption the legal rule of interpretation against it and in our opinion it is not overcome by the other clauses.

The legatees of the property if sold were not necessarily in being or known to testator; it is to the *heirs* of John Barber, the same word he uses in another part of the will, "John Barber and his heirs," evidently in the latter not meaning children.

If an indefinite failure of issue was intended, the fact as to Amanda having had offspring, or her having survived them, is immaterial.

We are of the opinion that the will of James S. Stevenson devised an estate-tail in the property in question to Amanda Stephens, which having been duly barred and the title conveyed to the defendants, they have a good title to the property and the plaintiffs has no title thereto.

And now, 25th of July, 1894, after argument and upon consideration, the Court being of the opinion that the law is with the defendants, judgment is entered in favor of the defendants, *non obstante vendicto.*

Per Curiam.

To which ruling of the Court counsel for the plaintiff except and thereupon bill sealed for plaintiff.

THOS. EWING.

[SEAL.]

Commonwealth of Pennsylvania, }
Allegheny County. } *ss.*

[SEAL.] I, Andrew J. McQuitty, Prothonotary of the Court of Common Pleas, No. 2, in and for said County, certify that the foregoing is a full and correct copy of the whole record of the case herein stated, wherein S. Duffield Mitchell, administrator, etc., plaintiff and the P., Ft. W. & C. Ry. Co. and Pennsylvania Company, Lessee, defendant, as the same remains of record before the said Court, at No. 687 of April Term, A. D. 1893.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, the 24th day of May, A. D. 1895.

A. J. McQUITTY,
Prothonotary.

Western District of Pennsylvania, }
County of Allegheny. } *ss.*

THE COMMONWEALTH OF PENNSYLVANIA,

To the Judges of the Court of Common Pleas No. 2, for the County of ......, Greeting:

We being willing for certain causes, to be certified of the matter of the Appeal of S. Duffield Mitchell, admr. d. b. n. c. t. a. of James S. Stevenson, decd., from the judgment of your said Court, at No. 687 of April Term, A. D. 1893, wherein said appellant is plaintiff and the Pittsburg, Fort Wayne and Chicago Railway Company and the Pennsylvania Company lessee, before you, or some of you, depending, do command you, that the record and proceedings aforesaid,

with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, the fourth Monday of October next, to wit: October 22, A. D. 1894, so full and entire as in your Court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James P. Sterrett, Doctor of Laws, Chief Justice of our said Supreme Court at Pittsburgh, the 25th day of July, in the year of our Lord one thousand eight hundred and ninety-four.

[SEAL]

GEORGE PEARSON,
Prothonotary.

BILL OF EXCEPTIONS.

Be it remembered, That in the term of May, A. D. 1895, of the above Court, came the said plaintiffs into the said Court and impleaded said defendants in a certain action of ejectment, in which the said plaintiffs declared (as appears by the record) and the said defendants pleaded (as appears by the record). And thereupon issue was joined between the said plaintiffs and the said defendants.

And afterwards, to wit at a session of said Court held at the City of Pittsburgh before the Hon. M. W. Acheson, Judge of the Circuit Court as aforesaid, and the Hon. Joseph Buffington, sitting as Circuit Court Judge, on the 24th day of May, 1895, the aforesaid issue between said parties came to be tried before the court without the intervention of a jury in accordance with a stipulation in writing, signed by counsel for said plaintiffs and defendants, and filed among the records of said case; at which day came as well said plaintiffs as said defendants, by their respective counsel. And upon trial of said case, the counsel for the said plaintiffs then gave in evidence as follows:

First: Plaintiffs offer in evidence the plaintiff's abstract of title, in so far as the same is not objected to and not controverted by the abstract of title filed on the part of defendants, for the the purpose of showing title in fee simple to the land in controversy in James S. Stevenson, the common source of title.

Second: Plaintiffs offer in evidence a duly certified copy of the last will and testament of James S. Stevenson, of the City of Pittsburgh, deceased, which was duly probated and registered on the 18th of October, 1831, in the Register's Office of Allegheny County, Pennsylvania, in Will Book, No. 3, page 550, it being admitted that George Ogden and James S. Craft, attesting witnesses to said will, are dead.

Third: Plaintiffs offer again the certified copy of said will, with the affidavit of probate attached thereto, duly certified in connection with the will, for the purpose of showing the time at which the will was published by the testator in the presence of the subscribing witnesses.

And thereupon defendant's counsel object to the offer of the probate of the will, for the purposes stated, as being incompetent, irrelevant and not being legal evidence affecting in any manner the defendants in this suit.

And thereupon the learned Court, for the present overruled the objection to the offer and received the evidence under objection, the effect and admissibility thereof to be further considered, and exceptions noted for the defendants.

Copy of record given in evidence by plaintiffs, as above stated (as appears by the record).

Fourth: Plaintiffs offer in evidence a duly certified exemplification of the record of the Orphans' Court of Allegheny county, Pennsylvania, in the matter of the estate of Amanda Stephens, minor, showing the appointment of George Ogden as guardian of the said minor (being No. 35, October term, 1831, in said Court), and also, in the same connection, a like exemplification from the said Court (being No. 41, October term, 1847, in said Court), showing the account of the said guardian, and the acquittance of the balance due thereon by Amanda Haight or Amanda Stephens. Plaintiffs offer this for the purpose of connecting George Ogden with Amanda Stephens, to be followed by evidence that she became a member of the family of her guardian, and to be followed by evidence of the declarations of James S. Stevenson as to her parentage, communicated to Amanda Stephens by Mrs. George Ogden; plaintiffs will also follow this with evidence that Mrs. Ogden is dead.

And thereupon defendants' counsel object to the offer as being immaterial and irrelevant; and that it does not form any part of the title.

And thereupon the learned Court, for the present, over-

ruled the objection to the offer and received the evidence, reserving the question of its admissibility and effect for further consideration, and exception noted for the defendant.

Copy of records given in evidence by plaintiff, as above stated (as appears by the record).

Fifth: Plaintiffs offer in evidence a duly certified exemplification of the record of the Orphans' Court of Allegheny, in the matter of the estate of James S. Stevenson, deceased, at No. 3, March term, 1835, No. 15, October term, 1837, and No. 11, October term, 1840, being the administration account of Charles Avery, John M. Snowden and John Thaw, executors of the estate of James S. Stevenson, deceased, for the purpose of showing that at the time of the death of James S. Stevenson there were living children of John Barber, of Columbia, Pennsylvania.

And thereupon defendants' counsel object to the offer, as being incompetent and irrelevant, (1) for the reason that it is not the best evidence for the purpose for which it is offered, (2) as not being set forth or referred to in the plaintiffs' abstract of title, (3) as being immaterial.

And thereupon the learned Court, for the time being, overruled the objection to the offer and received the evidence, its admissibility and effect to be further considered, and exception noted for the defendants.

Copy of records given in evidence by plaintiffs, as above stated (as appears by the record).

Sixth: Plaintiffs offer in evidence agreement of counsel as to certain facts and as to certain depositions taken in a former suit, and filed in the pending case May 24, 1895, and call attention to the fact that by agreement it is admitted that Eliza Whitlock Haight, daughter of Amanda Stephens, devisee of lots 67, 68, 69 and 70, intermarried with Alfred Brames Hall, of London, England, and died on the 16th of June, 1888, without issue her surviving. It is admitted that Amanda Stephens, the devisee aforesaid, died September 28, 1891.

Copy of agreement of counsel given in evidence by plaintiff's, as above stated, (as appears by the record.)

Seventh: Plaintiffs in evidence, in pursuance of the agreement referred to, the facts as found in the case in the Court of Common Pleas No. 2, of Allegheny County, at No. 687 A. il Term, 1893, and as set out in paragraphs Nos. 1, 2, 3, 12, 13, and 14, attached to said agreement, (as appears by the record.)

Eighth: Plaintiffs offer in evidence a duly certified copy of an agreement between Samuel W. Barber and others, being the children and descendants of John Barber, dated January 19th, 1895, and recorded in the Recorder's Office of Allegheny County, in Deed Book, Vol. 897, page 192, and deed of James J. Creigh, and others to Samuel W. Barber, dated January 19th, 1895, and recorded in the Recorder's Office of Allegheny County, in Deed Book, Vol. 897, page 195, (as appears by the record.)

Ninth: Plaintiffs offer in evidence the return of the United States Marshal of the writ, showing the defendants to be in possession of the premises, (as appears by record.)

Tenth. The plaintiffs offer in evidence the deposition of Mary B. Smith, an aged and infirm witness, taken in behalf of the plaintiffs, by agreement of counsel. And thereupon the counsel for the said defendants object to the same, because it was immaterial, irrelevant and incompetent.

And the learned Court overruled the objection and received in evidence the deposition, its admissibility and effect to be further considered, and exception noted for the defendants.

And thereupon the counsel for plaintiffs read the said deposition in evidence, and a copy of the same was given in evidence by plaintiffs, as above stated, (as appears by the record.)

Eleventh. Plaintiffs offer in evidence the deposition of Mrs. Elizabeth S. Russell, taken by agreement of counsel, on May 10th, 1895.

And thereupon the counsel for the said defendants objected to the same, because it was immaterial, irrelevant and incompetent: (1) for the reason that the declaration sought to be shown by the witness are not declarations of any one related by either blood or marriage to Amanda Stephens, aftewards Mrs. Haight; (2) for the reason that it is incompetent and irrelevant for the purpose of proving the illegitimacy of Amanda Stephens.

And the learned Court overruled the objection and received in evidence the deposition, its admissibility and effect to be further considered, and exception noted for the defendants.

And thereupon the counsel for plaintiffs read the said deposition in evidence, and a copy ot the same was given in evidence by plaintiffs, as above stated, (as appears by the record.)

Twelfth: Plaintiffs offer generally the abstract of title of the plaintiffs, in so far as it is not controverted by the abstract of defendants' title.

And thereupon the plaintiffs closed.

And the counsel of said defendants then gave in evidence the following:

First: All the facts referred to and mentioned in the defendants' abstract of title, from and including paragraph 4 of the said abstract of title, to and including paragraph 13, (as appears by the record.)

Second: Defendants also offer in evidence certified copy of the record of the proceedings in the case of *S. Duffield Mitchell, Admr., vs. The Pgh., F. W. & C. Ry. Co., et al.*, at No. 687 April Term, 1893, Court of Common Pleas No. 2, of Allegheny County, reserving the right, by consent of the counsel on the other side, to have included in the record, as exemplified, a *remittitur* from the Supreme Court. Counsel for plaintiffs object to this as incompetent and irrelevant.

Third: Defendants offer in evidence the facts set forth

in the special verdict attached to the agreement of counsel, already offered in evidence by plaintiffs, paragraphs from and including No. 4 to and including paragraph No. 11, (as appears by record.)

Fourth: Defendants offer in evidence the agreement of counsel, already offered in evidence by plaintiffs, and call the Court's attention to the following paragraph, viz: That the said suit, No. 687 April Term, 1893, was an ejectment suit, and the above named Samuel W. Barber and others were the equitable or beneficial plaintiffs therein, and the above Railway Companies the defendants therein, (as appears by the record).

Fifth: Defendants offer in evidence the opinion of the Supreme Court in the case referred to, being 687 April Term, 1893. Counsel for plaintiffs object to this as incompetent and irrelevant.

And thereupon the defendants closed.

And afterwards, to wit, on August 2nd, 1895, the learned Court, in writing, found and adjudged as follows:

"And now, August 2nd, 1895, upon due consideration, the Court finds for the defendants; and it is ordered that judgment be entered in their favor."

And in an opinion by the Hon. M. W. Acheson, Circuit Court Judge as aforesaid, reduced to writing and filed in said Court on the date aforesaid, the said Court ruled, held and adjudged that the following evidence produced, offered in evidence and duly admitted as aforesaid, by the plaintiffs for the purpose of establishing as a fact in this case that Amanda Stephens was the natural child of James S. Stevenson, which evidence was as follows:

Deposition of Mrs. Mary Blaine Smith, in part, as follows:

"I was born in November, 1803, in Shippensburg, then Franklin, but now Cumberland County, Pennsylvania. I came to Pittsburgh to live in 1810. My father's name was

Francis Herron, a clergyman, and pastor of the First Presbyterian Church of Pittsburgh. When we first came to Pittsburgh we lived at the corner of Penn and Marberry streets. We lived there about two years. My father then built a house at the corner of Tenth (Wayne street) and Penn, to which we moved. The house was on the corner where Dilworth's coffee house now stands. * * * * * *

Mr. Stevenson then lived on the northeast corner of Penn Street and Wayne Street, now Tenth Street. It was bounded by Tenth Street, Wayne Street, the Canal and the River. * * * * * * * * *

He was not a married man—was never married. His colored people kept his house, Ralph and Peggy. Mr. Stevenson was in the drug business for many years. He was quite a politician, a Democrat. He was in Congress for four years. Mr. Stevenson and my father were great friends as neighbors, though they differed in politics. * *

I was acquainted with Amanda Stephens. Mr. Ogden was her guardian. Amanda Stephens was reputed to be the daughter of James S. Stevenson. She always bore his name. It was generally known that she was his illegal daughter. I knew Mrs. Ogden very well.

Q. Did Mrs. Ogden ever tell you of a promise that Mr. Stevenson had exacted of Mrs. Ogden respecting Amanda?

A. Yes, not to let Amanda's mother see Amanda if she came. Amanda lived with the Ogdens when she was a young lady and went to school with Ogden's daughters in New York. Miss Ogden is now Mrs. Elizabeth Russell. I do not know her age when she went to live with the Ogdens, but she was, I think, a school girl.

Amanda married a Mr. Haight, who, I think, lived in New York and made her acquaintance while she was there at school. The marriage ceremony was performed in Mr. Ogden's house. My father, Dr. Herron, performed the ceremony."

Deposition of Mrs. Elizabeth S. Russell, in part, as follows:

"Q. Mrs. Russell, you are a resident of the City of Pittsburgh, are you not?

A. Yes, sir.

Q. How long have you resided in Pittsburgh?

A. Since 1826.

Q. Will you please give us your age?

A. I suppose that would make me 68.

Q. You were born in 1826?

A. Yes, sir.

Q. What was your maiden name?

A. Elizabeth Ogden.

Q You were the daughter of whom?

A. George and Elizabeth Ogden.

Q. Did you knaw Amanda Stephens?

A. Yes.

Q. Do you know when you first became acquainted with Amanda Stephens?

A. I think she was about five years old; I can't exactly tell, but I think so.

Q. Do you know whether your father was guardian of Amanda Stephens?

A. He was always supposed to be.

Q. He was?

A. Yes, sir.

Q. Did Amanda Stephens make her home in your family?

A. Yes, sir.

Q. Can you give about the date when she first came to live with you, Mrs. Russell?

A. I don't remember that; we were all little children; I don't know that I could give it.

Q. Do you know about how old you were?

A. Yes; I don't think there was much difference in our ages.

Q. Do you know about how old you were when she came to live in your family?

A. I don't think I was more than 5 or 6.

Q. Do you know how she came to reside in your family?

A. Yes, sir; she came I remember—

By Mr. Scott:

Q. Do you know of your own knowledge?

A. From the hearing of my mother. She was brought down there to see Mr. Thaw and my grandfather and Mr. Avery. I have heard my mother say this—from the nunnery, where she was at that time, and they thought, in consideration of this estate, better to have her reared carefully in the faith, the Protestant faith, and my mother, against her wishes, was persuaded to take her with that view; I have heard my mother say that, and she (my mother) was a very zealous Christian herself.

Q. Now, when you speak of the estate, you mean in consideration of the estate she got from James Stevenson?

A. Yes.

Q. Do you know whether or not Mr. Thaw and Mr. Snowden and Mr. Avery were the executors of James S. Stevenson's will?

A. Always heard so.

Q. And it was, then, because of their executorship that she was brought down to see them?

A. Yes. They wanted to see this child. You know she was a remarkably beautiful child.

Q. How long did Amanda live in your family?

A. Until after she was 21, until after she was married.

Q. That was, then, about the Fall of 1847, wasn't it?

A. She was married December 2d, 1847.

Q. Was she married at your house?

A. At our house.

Q. Do you know who performed the marriage ceremony?

A. Old Dr. Herron.

Q. And she was married to whom?

A. Samuel Haight.

Q. Now, while she resided at your house, was she considered as a member of your family?

A. Oh, yes.

Q. By all?

A. By all concerned.

Q. Was she sent to school from your house?

A. Oh; yes, to the best.

Q. Where, if you please?

A. Do you want to know all the different schools?

Q. No, not all.

A. The first school I forget, but the last schools were Mrs. Macleod's, then afterwards to Staten Island under the name of Mrs. Ingliss' school, mother of Mrs. Macleod.

Q. You went with her to that school?

A. Yes, we all went together, my sisters and myself.

Q. Did you ever hear your mother or your father make any declaration respecting the pedigree of Amanda?

A. Only by hearsay that she was Mr. Stevenson's daughter.

Q. Who did you hear say that?

A. I have heard my mother discuss it; the fact is she told Mrs. Haight when she was a young girl, because she thought it was necessary for her to know.

Q. Told her what?

A. Told her that Mr. Stevenson was her father. When she was married Mr. Haight was informed of that fact, and he knew it quite well.

Q. According to your information, then, James Stevenson was not a married man?

A. Never heard of his marrying. I think Mrs. Smith could tell you that; she belongs to a generation preceding mine.

Q. I believe your father and Mr. Stevenson were associated in business, were they?

A. Yes.

Q. What sort of business?

A. Wholesale drug business and the lead business; first lead business west of the mountains.

Q. Then your mother did tell you that Amanda Stephens was the illegal child of James S. Stevenson?

A. She told her herself.

Q. She told you, too, did she not?

A. Just mentioned it in a casual sort of way, before her to her.

Q. Were you present when she told it to Amanda Stephens?

A. I forget that; it was always an accepted fact that she was.

Q. It was always an accepted fact among the members of your family that she was?

A. Yes.

Cross-Examination by Mr. Scott.

Q. Your father and mother, of course, are both dead?

A. Yes.

Q. How many years since?

A. My mother only six years ago.

And the duly certified exemplification of the record of the Orphans' Court of Allegheny County, Pennsylvania, in the matter of the estate of Amanda Stephens, minor, showing the appointment of George Ogden as guardian of the said minor, (being No. 35, October Term, 1831, in said Court,) and also, in connection therewith, a like exemplification from said Court, (being No. 41, October Term, 1847, in said Court,) showing the account of the said guardian and the acquittance of the balance due thereon, signed and executed by "Amanda Haight, formerly Amanda Stevenson," which exemplification was duly admitted in evidence under objection, as appears in the fourth offer of plaintiffs, duly set forth as above in this bill of exceptions, was insufficient and incompetent, as matter of law, to establish the said fact

that Amanda Stephens was the natural child of James S. Stevenson.

And thereupon the learned Court refused to find, upon the evidence above set forth, that Amanda Stephens was the natural daughter of James S. Stevenson.

And thereupon the Counsel for the said plaintiffs did then and there except to the aforesaid ruling and opinion of the said Court; that is to say:

1. The ruling and holding of the learned Court that the evidence above set forth at length was insufficient and incompetent, as matter of law, to establish the fact that Amanda Stephens was the natural child of James S. Stevenson.

2 The refusal of said Court to find, as a fact from said evidence, that Amanda Stephens was the natural daughter of James S. Stevenson.

3. The action of the Court in finding as follows: "And now, August 2d, 1895, upon due consideration, the Court finds for the defendants, and it is ordered that judgment be entered in their favor."

4. The action of the Court in not entering judgment for the said plaintiffs, upon all the evidence in this case.

The said Counsel for the plaintiffs did then and there tender this bill of exceptions to the rulings, findings and opinion of said Court, and requested that the seal of the Judge aforesaid should be put to the same, and on this 31st day of August, 1895, they do present to the Court this bill of exceptions, as above particularly set forth, in the above stated cause, and do request the Court to seal the same, which is accordingly done, the day and year last above written.

M. W. ACHESON,
Circuit Judge. [SEAL.]

BOND.

Know all men by these presents, That we, Samuel Whitehill Barber, of the State of Missouri, Richard Treat Leech and Mary Ann Leech, his wife, of the State of Ohio, Edward P. Clark, of the State of New York, George Hepburn Watson and Anne Townsend Watson, his wife, of the State of New Jersey, Carver Worthington Barber, of the State of Minnesota, and S. Duffield Mitchell, of Pittsburgh, State of Pennsylvania, are held and firmly bound into the Pittsburgh, Fort Wayne and Chicago Railway Company and The Pennsylvania Company, both corporations being citizens of the State of Pennsylvania, in the sum of five hundred dollars ($500), to be paid to the said The Pittsburgh, Fort Wayne and Chicago Railway Company and the Pennsylvania Company their successors and assigns, to which payment will and truly to be made we do find ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated this 24th day of August, A. D. 1895.

Whereas, the above named Samuel Whitehill Barber and others, co-plaintiffs with him, have procured a writ of error in the United States Circuit Court of Appeals for the Third Circuit to reverse the verdict and judgment rendered in a certain action at law, wherein the above mentioned obligors (excepting the said S. Duffield Mitchell) are plaintiffs, and the above mentioned obligees are defendants, in the Circuit Court of the United States for the Western District of Pennsylvania, No. 10, May Term, 1895.

Now, therefore, the condition of this obligation is such, that if the above named plaintiffs shall prosecute said writ of error to effect, and shall answer all damages and costs that may be adjudged against them, if they fail to make good

their said appeal and writ of error, then this obligation shall be void, otherwise to be and remain in full force and virtue.

SAMUEL WHITEHILL BARBER. [SEAL]
RICHARD TREAT LEECH. [SEAL]
MARY ANN LEECH. [SEAL]
EDWARD P. CLARKE. [SEAL]
GEORGE HEPBURN WATSON. [SEAL]
ANNE TOWNSEND WATSON. [SEAL]
CARVER WORTHINGTON BARBER. [SEAL]
By their Attorney,
S. D. MITCHELL.
S. DUFFIELD MITCHELL. [SEAL]

Signed, sealed and delivered in the presence of
C. W. LEPPER.

Allegheny County, ss:

Before me personally appeared S. Duffield Mitchell, above named, who being duly sworn, says that he is worth more than the amount of the within bond over and above all debts and liabilities whatever.

S. S. DUFFIELD MITCHELL.

Sworn and subscribed this August 24, 1895.

H. D. GAMBLE,
Clerk.

WRIT OF ERROR.

The United States of America, ss:

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judge of the United States Circuit Court for the Western District of Pennsylvania, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which in the said Circuit Court before you between Samuel Whitehill Barber, Richard Treat Leech and Mary Ann Leech, his wife in right of said wife, Edward P. Clarke, George Hepburn Watson and Anne Townsend Watson, his wife in right of said wife, and Carver Worthington Barber, plaintiffs, and the Pittsburgh, Fort Wayne and Chicago Railway Company and the Pennsylvania Company, defendants, a manifest error hath happened to the great damage of the said plaintiffs, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done the parties in this behalf, do command you, if judgment be therein given, that, then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, together with this writ, so that you have the same at Philadelphia on the third Tuesday of September, next, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid, being inspected, the said United States Circuit Court of Appeals may cause further to be done to correct that error, what of right and according to the laws of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 31st day of August, A. D. 1895.

[SEAL]

H. D. GAMBLE,
Clerk.

Allowed by
M. W. ACHESON,
Cir. J.

CITATION.

The United States of America, Third Judicial Circuit. } ss.

To the Pittsburgh, Fort Wayne and Chicago Railway Company and the Pennsylvania Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Third Circuit, to be holden in the City of Philadelphia, in said circuit, on the third Tuesday of September next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Western District of Pennsylvania, wherein Samuel Whitehill Barber, Richard Treat Leech and Mary Ann Leech, his wife, in right of said wife, Edward P. Clarke, George Hepburn Watson and Anne Townsend Watson, his wife, in right of said wife, and Carver Worthington Barber are plaintiffs in error, and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 31st day of August, in the year of our Lord one thousand eight hundred and ninety-

five, and of the Independence of the United States of America the one hundred and twentieth.

M. W. ACHESON,
Circuit Judge.

CERTIFICATE.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

SAMUEL W. BARBER, *et al.*, *vs.* PITTSBURGH, FT. WAYNE & CHICAGO RAILWAY CO. *et al.* } No. 10 May Term, 1895.

Western District of Pennsylvania, ss:

[SEAL.] I, H. D. Gamble, Clerk of the Circuit Court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, the 31st day of August A. D., 1895.

H. D. GAMBLE,
Clerk.

Western District of Pennsylvania, ss:

I, M. W. Acheson, Judge of the United States Circuit Court for said district, do hereby certify that H. D. Gamble above named was, at the time of making the above certificate, and is now Clerk of the said Court, and that the said certificate made by him is in due form of law.

M. W. ACHESON,
U. S. Circuit Judge.

PITTSBURGH, August 31, 1895.

Office Supreme Court U. S.
FILED,
Mar 2 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. ~~385~~ OCTOBER TERM, 1895.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH, and MARY ANN LEECH, his wife, in right of said wife, EDWARD P. CLARKE, GEORGE HEPBURN WATSON and ANNE TOWNSEND WATSON, his wife, in right of said wife, and CARVER WORTHINGTON BARBER, respectively citizens of the States of Missouri, Ohio, New Jersey and Minnesota,

vs.

THE PITTSBURGH, FORT WAYNE and CHICAGO RAILWAY COMPANY and THE PENNSYLVANIA COMPANY, Lessee, both, corporations and citizens of the State of Pennsylvania.

Petition for Writ of Certiorari, requiring the United States Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court of the United States for its consideration, the whole record and cause of Samuel Whitehill Barber et al. vs. The Pittsburgh, Fort Wayne & Chicago Railway Company et al., being No. 36 September Term, 1895, therein:

JOHN S. FERGUSON,
S. DUFFIELD MITCHELL,
Counsel for Petitioners.

SMITH BROS. FRANKLIN PRINT, 405 GRANT ST., PITTSBURGH, PA.

IN THE

Supreme Court of the United States.

No. 885 OCTOBER TERM, 1895.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH, and MARY ANN LEECH, his wife, in right of said wife, EDWARD P. CLARKE, GEORGE HEPBURN WATSON and ANNE TOWNSEND WATSON, his wife, in right of said wife, and CARVER WORTHINGTON BARBER, respectively citizens of the States of Missouri, Ohio, New Jersey and Minnesota,

vs.

THE PITTSBURGH, FORT WAYNE and CHICAGO RAILWAY COMPANY and THE PENNSYLVANIA COMPANY, Lessee, both, corporations and citizens of the State of Pennsylvania.

Petition for Writ of Certiorari, requiring the United States Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court of the United States for its consideration, the whole record and cause of *Samuel Whitehill Barber, et al. vs. The Pittsburgh, Fort Wayne & Chicago Railway Company, et al.*, being No. 36 September Term, 1895, therein.

To the Honorable, the Supreme Court of the United States:

The petition of Samuel Whitehill Barber, Richard Treat Leech, Mary Ann Leech, his wife, Edward P. Clarke, George Hepburn Watson, Anne Townsend Watson, his wife, and Carver Worthington Barber, respectfully shows to your Honorable Court as follows:

FIRST. On the second day of January, 1896, the United States Circuit Court of Appeals for the Third Circuit certified to your Honorable Court certain questions or propositions of law, concerning which it desires the instruction of your Honorable Court for its proper decision in the cause of Samuel Whitehill Barber, et al. vs. The Pittsburgh, Fort Wayne & Chicago Railway Company, et al., No. 36 September Term, 1895, which certificate contains a statement of the facts on which such questions or propositions of law arise, and was duly filed with the Clerk of the Supreme Court of the United States and by him docketed on the fifth day of February, 1896.

A certified copy of the entire record of the said case, No. 36 September Term, 1895, in the said United States Circuit Court of Appeals is herewith furnished and hereto annexed, as part of this application and petition, in conformity with Rule 37 of this Honorable Court, relative to cases from United States Circuit Courts of Appeals, and the same is marked "Exhibit A."

SECOND. That said cause is an ejectment suit for the recovery of certain lots, situate in the City of Pittsburg and State of Pennsylvania, and involves solely the proper construction of the will of one, James S. Stevenson, who was the owner in fee simple of said lots at the time of his death,

which occurred on October 16th, 1831, who was the common source of title of the parties, both plaintiff and defendant; and who, by his last will and testament, duly probated on October 18th, 1831, devised said lots in the following language, to wit:

> "I, James S. Stevenson, of the City of Pittsburgh, in the State of Pennsylvania, aged fifty years, on the twelfth day of January, 1831, reflecting on the certainty of death, and desirous of making a distribution of my property in the event of my decease, do hereby declare this writing to be my last will and testament, made this twelfth day of March, in the year of our Lord one thousand eight hundred and thirty-one.
>
> I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69 and 70, in the City of Pittsburgh, in their full extent, bounded, etc. * * * (description includes the property in suit in this case.) Said Amanda Stephens is now five years old (born April 7, 1826). Stephens and his wife, the parents of Amanda's mother, live near Connellsville, in Fayette County, Pa.
>
> In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Penna."

THIRD. That S. Duffield Mitchell was duly appointed administrator *d. b. n. c. t. a.* of said James S. Stevenson, deceased, after the death of said Amanda Stephens without leaving offspring by her husband, or husband surviving her, which event occurred on September 28th, 1891; and as such

administrator, on March 20th, 1893, to No. 687 April Term, 1893, brought a suit in ejectment against the above named defendants in the Court of Common Pleas No. 2, of Allegheny County, Pennsylvania, for the recovery of said lots.

FOURTH. That on May 21, 1894, a special verdict of the jury in said ejectment suit was entered in favor of the plaintiff for the land described in the writ, subject to the opinion of the Court on the question of law reserved upon the facts therein specially set forth; and subsequently, to-wit: on July 25th, 1894, the said Court, in an opinion by Ewing, P. J., entered judgment for the defendants *non obstante veredicto.*

FIFTH. That in said opinion, said Court in substance held, that the language of the will, set forth in parapraph 2 of this petition, gave an estate tail to Amanda Stephens, the devisee, for the reason that the gift over to the heirs of John Barber was upon a remote failure of issue to an indefinite class of persons (heirs of John Barber), and therefore void. Said Court also held that the circumstances, the age of the devisee, and the will, left it in no doubt that the contingency of Amanda's death did not mean her death before the testator.

SIXTH. That an appeal was then taken by the plaintiff therein to the Supreme Court of Pennsylvania to reverse said judgment, which appeal was numbered 257 October Term, 1894, and, on January 7th, 1895, the said Court affirmed the judgment of said Court of Common Pleas No. 2, of Allegheny County, Pennsylvania, in an opinion by Mr. Chief Justice Sterrett, in which it was held, in substance, that while the testator had died prior to the Wills Act of 1833, he stated in the preamble of his will a desire to make a distribution of

his property, and then in the body of the will devised the land, without words of inheritance, therefore, the introductory words were to be carried down into the *corpus* of the will, to show that the testator meant to dispose of his whole interest in the particular devise; and that the gift over to make sale of the lots and divide the proceeds of sale equally amongst the heirs of John Barber upon the death of Amanda, unmarried, or, if married, upon her death without offspring by her husband, was manifestly substitutionary in character, and meant to take effect, if at all, before the death of testator; and that Amanda, having survived the testator, took an absolute *fee simple* in the lots, and not a *fee tail*. That the said Supreme Court further held that the failure of issue contemplated by the testator was a definite one; that by "heirs of John Barber," he being alive, testator meant the children of John Barber; that the extreme youth of Amanda did not create the presumption that testator could not have had in contemplation the contingency of her marriage and death without issue in his lifetime; that no presumption could arise from the fact of making a will that testator expected to die before Amanda should attain a marriageable age, and that, so far as appeared from the record in the case, the testator may have had an expectation of long life. (See opinion of Supreme Court of Pennsylvania reported in the regular reports thereof, in Volume 165 of Pennsylvania State Reports, at page 645.

SEVENTH. That upon examination of said reported case it will be found that the reasoning and opinion of Judge Ewing in the Court of Common Pleas No. 2 of Allegheny County therein were reversed by the Supreme Court, while the judgment was affirmed; that the printed brief of plaintiff

therein contained no argument upon that branch of the case, which the Supreme Court of Pennsylvania held to be decisive against the plaintiff; and that said case was decided by the Supreme Court of Pennsylvania without hearing counsel for defendants; and petitioners aver that counsel for plaintiff, in his oral argument, did not argue that branch of the case, which the Supreme Court of Pennsylvania adopted as decisive thereof against the plaintiff. It is thus apparent that the Pennsylvania Supreme Court ruled certain points—to wit, that the failure of issue of Amanda was not indefinite, and that "heirs of John Barber" meant the children of John Barber—in favor of, and according to, the plaintiff's contention in his paper book, but decided the case against the plaintiff upon the theory that testator intended the gift over to the heirs of John Barber to become effective only, if Amanda died before him, which theory was presented only in defendants' paper book, and which was not argued orally by counsel for plaintiff, and which was against the ruling of the Court of Common Pleas of Allegheny County, to wit: that said Court was in no doubt that testator did not contemplate Amanda's death before his own.

EIGHTH. That on February 2d, 1895, Samuel Whitehill Barber *et al.*, the petitioners herein, having been the equitable or beneficial plaintiffs in the first ejectment suit, mentioned above, brought a second action of ejectment in their own names in the Circuit Court of the United States for the Western District of Pennsylvania, against the defendants, above mentioned, for the recovery of said certain lots of land, above mentioned, and, on May 25th, 1895, said case came on for trial, by agreement of counsel, before the Court without the intervention of a jury, at which trial the special

verdict of the jury described in paragraph 4 of this petition was offered in evidence without objection, and the plaintiffs offered the deposition of Mrs. Mary Blaine Smith (see certified copy of record, pp. 42–47); the deposition of Mrs. Elizabeth S. Russell (see certified copy of record, pp. 47–53); and certain exemplifications of record (see certified copy of record, pp. 34–38), for the purpose of proving, *in addition to the facts of said special verdict*, the facts and circumstances under which the testator's will was first published, and for the further purpose of proving the pedigree of Amanda Stephens, the devisee, to wit: that she was the natural daughter of testator, James S. Stevenson. Said Circuit Court of the United States, in its findings of fact and opinion as to the law thereon, filed August 2d, 1895 (see certified copy of record, pp. 16–21), found the following *additional* facts, as set forth by the United States Circuit Court of Appeals for the Third Circuit, in paragraph 2 of their amended certificate, as follows:

> "That on the 16th day of October, 1831, when confined to his room by sickness, and after a dangerous illness for two weeks preceding his death, the testator, though he had theretofore signed his will, first published the same in the presence of witnesses, whom he called to attest it, and a few hours thereafter died, and this will, on the 18th day of October, 1831, was duly probated; which facts, as to the time and circumstances of publication, were not found by the special verdict on which judgment was entered in the ejectment suit in the State Courts of Pennsylvania."

But held that the said depositions and exemplifications of record, submitted in evidence, were not competent to es-

tablish the truth of the allegation, that Amanda was the natural child of James S. Stevenson, which ruling of the said Court was excepted to by the plaintiffs and was assigned for error upon the writ of error subsequently sued out by your petitioners, as plaintiffs in error, to the United States Circuit Court of Appeals for the Third Circuit in the 1st, 2d, 3d and 4th assignments of error (see certified copy of Record, pp. 22–28).

NINTH. That said Circuit Court of the United States for the Western District of Pennsylvania, in its findings of fact and opinion, filed August 2d, 1895, awarded judgment in favor of defendants, and judgment was entered accordingly, and in an opinion by Acheson, Cir. J., the said Court held, that even if it did not follow the decision of the Supreme Court of Pennsylvania in the construction of testator's will, it was not called upon to express an opinion whether the evidence, above mentioned, warranted a different construction of the will from that adopted by said Pennsylvania Supreme Court, because if the said devise in said will did not vest in Amanda an estate in fee simple, it did vest in her at least an estate tail; and that the gift over to the heirs of John Barber was to named living persons upon the failure of the issue of Amanda Stephens, and therefore the failure of issue was indefinite; though the Supreme Court of Pennsylvania had ruled that the failure of issue in this will was not indefinite and remote.

TENTH. That your petitioners, as plaintiffs in error, in the aforesaid writ of error to the United States Circuit Court of Appeals for the Third Circuit, assigned for error in their 5th, 6th and 7th assignments of error (see certified copy of

Record, pp. 28 and 29) the action of said Circuit Court, in finding for the defendants in error, and in entering judgment in their favor, and in not finding for the plaintiffs in error, and giving judgment in their favor.

ELEVENTH. Your petitioners are advised and believe, that it is a principle of law that a Court of construction will look at the circumstances under which the devisor makes his will—as the state of his property, of his family and the like: *1 Jarman on Wills* (R. & T. Ed., 1881) 705. That an investigation of the facts under which the will was made, often materially aids in elucidating the scheme of disposition, which occupied the mind of the testator, and to this end it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret: *1 Jarman on Wills* (R. & T. Ed., 1881) 733; *Postlethwaite's Ap.*, 68 Pa., 477; *Stambaugh's Estate*, 135 Pa., 585, 597. The relationship of Amanda Stephens and James S. Stevenson thus becomes a material fact in the construction of this will, and *the evidence adduced by the plaintiffs in the second ejectment suit* is competent and sufficient, to establish the fact that Amanda Stephens was the natural daughter of James S. Stevenson for the following reasons:

(*a*) The deposition of Mrs. Mary Blaine Smith, in which she states that: "Amanda Stephens was reputed to be the daughter of James S. Stevenson. She always bore his name. It was generally known that she was his illegal daughter,"—was competent to establish such relationship.

In Phillips on Ev. (C. & H. Ed.) 223, the rule is stated to be:

"The evidence of strangers as to general reputation is receivable in matters of pedigree; but the evidence must be of a general nature; as that A was commonly reported to be the son of B or the father of C; or that A and B are married. There does not appear to be any sufficient reason for excepting such evidence. * * For the evidence usually produced in such cases cannot properly be called hearsay evidence, as it consists of original evidence of facts and circumstances."

Starkie on Ev. 47 (9th Am. Ed. 1879) says:

"Traditional declarations become the best evidence sometimes when those best acquainted with the fact are dead. When derived from those who are most likely to know the truth and are under no bias to misrepresent the fact, such evidence affords a reasonable presumption of truth."

The case of *Goodright vs. Moss*, Cowp. 591, decided by Lord Mansfield, is ample authority for this position.

1 Phillips on Ev. (5th Am. Ed.) 268, states that it is the rule that illegitimacy may be established by hearsay.

(*b*) The deposition of Mrs. Elizabeth S. Russell, in which she states that she was the daughter of George Ogden, who was a business partner of James S. Stevenson; that after Stevenson's death her father was appointed guardian of Amanda; that Amanda was soon thereafter, at a tender age, brought to the Ogden household, and there kept and reared as part of the Ogden family until her

marriage after attaining full age; that Mrs. Ogden had declared to deponent and to Amanda that she was Mr. Stevenson's natural daughter; that at the time of Amanda's marriage, Mr. Haight, her prospective husband, was informed of that fact; that it was always an accepted fact among the members of the Ogden family that such was Amanda's pedigree, and that Mr. and Mrs. Ogden are now dead, —was competent to establish such relationship.

1 Phil. on Ev., 270, says:

"The doctrine of Lord Mansfield, C. J., that tradition is sufficient evidence in point of pedigree (*Goodright vs. Moss*) must, said Lord Eldon, C., in the case of *Whitlocke vs. Baker*, 13 Ves. 54, be understood as it has been practiced and acted upon. The tradition must be from persons having such a connection with the family that it is natural and likely from their domestic habits and connections that they are speaking the truth and that they could not be mistaken. The nature of this connection was however undefined, though it does not appear to have been thought requisite that the declarant should be related by blood or affinity."

1 Phil. on Ev., 219, says: That on questions of pedigree hearsay to the second degree is admissible: hearsay "two-deep" is admissible: common repute in the family may often arise from hearsay more than "two-deep."

The rule is: There is no valid objection to such evidence because it is hearsay upon hearsay, provided all the declarations are within the family. Thus, the declarations of a deceased lady as to what has been stated to her by her husband in his lifetime are admissible in evidence: *Doe vs. Randall, 2*

M. & P., 20; Monckton vs. Atty. Gen'l, 2 Rus. & M. 165; Elliott vs. Pearsoll, 1 Peters 328–337; 1 Greenleaf on Ev., Sect. 103, Note 2.

George Ogden stood in *loco parentis* of Amanda. Having taken her into his family for purposes of protection, education and maintenance and as her legal guardian, he necessarily knew her precise parentage. If from no other source, his wife necessarily derived her information from him, and her declaration must of necessity have been his declaration to her.

(*c*) The exemplifications of record establish such relationship.

The will of Stevenson describes her as "Amanda Stephens, daughter of Margaret Stephens. * * * Said Amanda Stephens is now five years old (born April 7, 1826). Stephens and his wife, the parents of Amanda's mother, live near Connellsville, in Fayette County, Pa."

This description is strong circumstantial evidence that Amanda was base born, since Margaret Stephens' surname was the same surname as that of her parents. In 1831, after testator's death, when proceedings were had for the appointment of a guardian, her surname was still Stephens; but in 1848, after she had attained her majority, and after her marriage, we find her giving an acquittance to her guardian as "Amanda Haight, formerly Amanda Stevenson." In the statement of the guardian's account she is called Amanda Stevenson. (See certified copy of record, pp. 36 and 37.)

That circumstances may establish such fact, we have the following authority:

In Goodright vs. Saul, 4 T. R. 356, (see 1 Phil. on Ev. 218), Ashurst, J., observes, that "in that case there were strong circumstances to show that the son was a bastard; amongst others, a very forcible one occurred, namely, that the son had taken a different name from his birth—the name of the person with whom his mother was living at the time, which had been retained by him and his descendants ever since; this was a very strong *family recognition* of his illegitimacy."

TWELFTH: Your petitioners therefore respectfully submit that the statement of facts made by the United States Circuit Court of Appeals for the Third Circuit, and certified to this Court under its seal, does not contain all the facts necessary fully to answer the questions propounded for the instruction of said Court; and that your Honorable Court should have before it the whole record in this case, so that argument may be had upon all the assignments of error appearing in said record; and that the questions upon the legal and just construction and effect of the devise to Amanda Stephens under the will of James S. Stevenson, deceased, involved in, and presented by, the whole record and cause of your petitioners, should be fully presented to, and authoritatively and finally adjudged by, this Honorable Court upon and after a full presentation to the Court of the merits of said cause on the part of the parties, both plaintiff and defendant, and upon all the assignments of error, as therein filed.

Wherefore your petitioners repectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Ap-

peals for the Third Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said United States Circuit Court of Appeals in the said case therein, entitled Samuel Whitehill Barber *et al. vs.* The Pittsburgh, Fort Wayne & Chicago Railway Company *et al.*, No. 36 September Term, 1895, to the end that the whole record and cause may be reviewed, considered and determined by this Court, as provided in Section 5 of the Act of Congress, entitled "An Act to establis Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3d, 1891; and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act; and that the said judgment of the said Circuit Court of the United States for the Western District of Pennsylvania in said case, and every part thereof may be reversed by this Honorable Court.

And your petitioners will ever pray.

SAMUEL WHITEHILL BARBER,
RICHARD TREAT LEECH,
MARY ANN LEECH,
EDWARD P. CLARKE,
GEORGE HEPBURN WATSON,
ANNE TOWNSEND WATSON,
CARVER WORTHINGTON BARBER.

JOHN S. FERGUSON,
S. DUFFIELD MITCHELL,
of Counsel.

By their Attorney,
S. DUFFIELD MITCHELL.

State of Pennsylvania, }
County of Allegheny, } *ss.*

S. Duffield Mitchell, being duly sworn, says, that he is one of the attorneys and of counsel for the above named petitioners and as such has had personal charge for them of the case, in the foregoing petition mentioned, in the Circuit Court of the United States for the Western District of Pennsylvania, and in the United States Circuit Court of Appeals for the Third Circuit; that he has read the said petition by them subscribed; and that the facts therein stated are true and correct to the best of his knowledge, information and belief.

Sworn and subscribed to before me this 15th day of February, 1896. } S. Duffield Mitchell.

[SEAL.] H. D. Gamble,
Clerk of the Circuit Court of the United States for the Western District of Pennsylvania.

Office Supreme Court U. S.
FILED.
MAR 2 1896
JAMES H. MCKENNEY,
CLERK.

166-83/66-83

IN THE

Supreme Court of the United States,

WESTERN DISTRICT.

No. ~~835~~ OCTOBER TERM, 1895.

431.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH, AND MARY ANN LEECH, HIS WIFE, IN RIGHT OF THE SAID WIFE; EDWARD B. CLARKE, GEORGE HEPBURN WATSON, AND ANNE TOWNSEND WATSON, HIS WIFE, IN RIGHT OF THE SAID WIFE, AND CARVER WORTHINGTON BARBER, RESPECTIVELY, CITIZENS OF THE STATES OF MISSOURI, OHIO, NEW JERSEY AND MINNESOTA,

versus

THE PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY, AND THE PENNSYLVANIA COMPANY, LESSEE, BOTH CORPORATIONS AND CITIZENS OF THE STATE OF PENNSYLVANIA.

PETITION OF THE PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY AND THE PENNSYLVANIA COMPANY

For a writ of *certiorari*, directed to the United States Circuit Court of Appeals for the Third Circuit, requiring the said court to certify to this court for its consideration the whole record in the cause of Samuel Whitehill Barber *et al.* vs. The Pittsburgh, Fort Wayne & Chicago Railway Company *et al.*, at No. 36 September Term, 1895, of the said court.

SCOTT & GORDON,
Attorneys for Pennsylvania Company.

WATSON & McCLEAVE,
Attorneys for Pittsburgh, Ft. Wayne & Chicago Railway Co.

IN THE

Supreme Court of the United States,

WESTERN DISTRICT.

No. 885 OCTOBER TERM, 1895.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH, AND MARY ANN LEECH, HIS WIFE, IN RIGHT OF THE SAID WIFE; EDWARD B. CLARKE, GEORGE HEPBURN WATSON, AND ANNE TOWNSEND WATSON, HIS WIFE, IN RIGHT OF THE SAID WIFE, AND CARVER WORTHINGTON BARBER, RESPECTIVELY, CITIZENS OF THE STATES OF MISSOURI, OHIO, NEW JERSEY AND MINNESOTA,

versus

THE PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY, AND THE PENNSYLVANIA COMPANY, LESSEE, BOTH CORPORATIONS AND CITIZENS OF THE STATE OF PENNSYLVANIA.

PETITION OF THE PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY AND THE PENNSYLVANIA COMPANY

For a writ of *certiorari*, directed to the United States Circuit Court of Appeals for the Third Circuit, requiring the said court to certify to this court for its consideration the whole record in the cause of Samuel Whitehill Barber *et al.* vs. The Pittsburgh, Fort Wayne & Chicago Railway Company *et al.*, at No. 36 September Term, 1895, of the said court.

To the Honorable the Justices of the Supreme Court of the United States.

The petition of the Pittsburgh, Fort Wayne & Chicago Railway Company and the Pennsylvania Company, respectfully shows to your Honorable Court:

(1.) That on the 2d day of January, 1896, the United States Circuit Court of Appeals for the Third Circuit certified to your Honorable Court for decision certain questions or propositions of law concerning which it desires the instruction of your Honorable Court for its proper decision in the cause of Samuel Whitehill Barber *et al.* against The Pittsburgh, Fort Wayne & Chicago Railway Company *et al.*, at No. 36 September Term, 1895, of the said court, which certificate purports to contain a statement of the facts upon which said questions or propositions of law are supposed to arise, and was duly filed by the clerk of this court, and by him docketed herein on the 5th day of February, 1896.

(2.) That the statement of facts contained in the said certificate, sent up by the United States Circuit Court of Appeals for the Third Circuit, as your petitioners are advised and believe, does not contain or set forth all the facts shown by the record in the said cause that are material to the full understanding, discussion and proper decision of the questions of law upon which information is asked by the said court.

(3.) That the said cause is an ejectment suit involving the title to a large and valuable piece of ground lying in the city of Pittsburgh, Allegheny county, Pennsylvania, and the litigation concerning the same was commenced in the month of March, 1893, in the State courts of the State of Pennsylvania, and in said litigation in the State courts the title was

finally settled in favor of these petitioners by the decision of the Supreme Court of the State of Pennsylvania, rendered on January 7th, 1895, and soon thereafter the present suit, involving the same questions, was brought by the present plaintiffs in the Circuit Court of the United States for the Western District of Pennsylvania. That it is important for the interests of these petitioners to have the title to the said land finally determined. That the questions submitted to this court by the said Circuit Court of Appeals involve a discussion of the entire case, so that the removal of the entire record here will not add to the labors of this court.

(4.) And so, for the purpose of enabling your honors to have before you all the facts shown by the record necessary to an intelligent consideration and decision of the questions of law certified by the United States Circuit Court of Appeals for the Third Circuit, as well for the purpose of enabling this court to pronounce final judgment herein, these petitioners pray that your honors may order and direct the said United States Circuit Court of Appeals for the Third Circuit to transmit here, to this court, the entire record in the said cause.

(5.) While joining with the plaintiffs in error in their application to have the entire record removed here, these petitioners do not concur in the history of the litigation as set forth in the petition of the plaintiffs in error filed herein, and beg leave to submit the following answer to some of the paragraphs of the said petition:

(I.) The allegations of the fifth paragraph are incorrect in this: The opinion of the court therein referred to did not hold "that the circumstances, the age of the devisee, and the will, left it in no

doubt that the contingency of Amanda's death did not mean her death before the testator's," but merely and only held "that the will of James S. Stevenson devised an estate tail in the property in question to Amanda Stephens, which having been duly barred and the title conveyed to the defendants, they have a good title to the property, and the plaintiff has no title thereto," as by reference to the opinion of the said court will more fully appear.

(II.) The allegations of the sixth paragraph of the petition are incorrect in this: The Supreme Court of the State did not hold that the estate was not a fee tail, did not hold that the failure of issue contemplated by the testator was a definite one, but did only hold that the estate given to Amanda Stephens, under the will of James S. Stevenson, was an absolute estate, and that the limitation over to the heirs of John Barbor was substitutionary in character, to take place only in the event of Amanda dying before the testator, and, she having survived the testator, the substitution became forever impossible.

(III.) "The facts and circumstances under which the testator's will was first published," set forth in the eighth paragraph of the petition as being additional facts not found by the special verdict in the said court, were, as a matter of fact, fully before the said court, upon the only evidence upon which the finding in the record has been based, namely, the register's certificate of the probate attached to the certified copy of the will. The special verdict

found in the said court incorporated the whole of the will as a part of the finding of facts. The will thus incorporated as a part of the special verdict included the register's certificate as to the probate thereof, and the facts therein shown are referred to and commented upon in the opinion of the president judge of the Court of Common Pleas, and the said will, with the certificate of probate thereto, thus made part of the special verdict, was printed in the paper book of the appellants in the Supreme Court of the State, so that both of the said courts had before them

> "the facts and circumstances under which the testator's will was first published."

These facts, and circumstances, however, are not material in the construction of the will, as the will upon its face shows that it was made upon the 11th day of March, 1831, some seven months before the death of the testator, and, without publication or subscribing witnesses, was a good and valid will under the law of the State. At the time of the making of the will the testator was in good health and only fifty years of age.

And so your petitioners show that the Courts of the State had before them in the consideration of the proper construction of the will of James S. Stevenson, all the facts or circumstances shown by any relevant evidence in the present record contained, and that your Honors may be the more surely advised thereof, you should order and direct the transmission here of the entire record of the cause as tried in the Circuit Court of the United States, for the Western District

of Pennsylvania, and thence removed for review to the United States Circuit Court of Appeals for the Third Circuit.

And they will ever pray, etc.

SCOTT & GORDON,
Attorneys for Pennsylvania Company.

D. J. Watson

WATSON & MCCLEAVE,
Att'ys for Pittsburgh, Ft. Wayne & Chicago Railway Co.

Office Supreme Court U. S.
FILED.
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JAMES H. MCKENNEY,
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IN THE

Supreme Court of the United States.

431.

No. ~~885~~ OCTOBER TERM, 1895.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH and MARY ANN LEECH, his wife, in right of said wife, EDWARD P. CLARKE, GEORGE HEPBURN WATSON and ANNE TOWNSEND WATSON, his wife, in right of said wife, and CARVER WORTHINGTON BARBER, respectively citizens of the States of Missouri, Ohio, New Jersey and Minnesota,

Plaintiffs in Error.

vs.

THE PITTSBURGH, FORT WAYNE and CHICAGO RAILWAY COMPANY and THE PENNSYLVANIA COMPANY, Lessee, both, corporations and citizens of the State of Pennsylvania,

Defendants in Error.

MOTION TO ADVANCE CAUSE UPON THE DOCKET FOR ORAL ARGUMENT.

JOHN S. FERGUSON,
S. DUFFIELD MITCHELL,
Counsel for Plaintiffs in Error.

SMITH BROTHERS, FRANKLIN PRINT, 405 GRANT ST., PITTSBURGH, PA.

IN THE

Supreme Court of the United States.

No. 885 OCTOBER TERM, 1895.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH and MARY ANN LEECH, his wife, in right of said wife, EDWARD P. CLARKE, GEORGE HEPBURN WATSON and ANNE TOWNSEND WATSON, his wife, in right of said wife, and CARVER WORTHINGTON BARBER, respectively citizens of the States of Missouri, Ohio, New Jersey and Minnesota,

vs.

THE PITTSBURGH, FORT WAYNE and CHICAGO RAILWAY COMPANY and THE PENNSYLVANIA COMPANY, Lessee, both, corporations and citizens of the State of Pennsylvania.

MOTION TO ADVANCE CAUSE UPON THE DOCKET FOR ORAL ARGUMENT.

And now, to wit, March 2, 1896, come Samuel Whitehill Barber, Richard Treat Leech, Mary Ann Leech, his wife, Edward P. Clarke, George Hepburn Watson, Anne Townsend Watson, his wife, and Carver Worthington Barber, by their attorneys, John S. Furguson and S. Duffield Mitchell, and move the Honorable, the Supreme Court

of the United States, to enter an order herein advancing this cause upon the docket for oral argument, for the following reasons, viz.:

FIRST. The right of action of the plaintiffs against the defendants accrued on September 28, 1891, the date of the death of Amanda Stephens, without leaving husband or issue her surviving.

As soon as plaintiffs had learned of said death, and, after investigation, had secured sufficient legal proof of the fact that Amanda had died without leaving husband or issue her surviving, and of other facts necessarily preliminary to a suit in ejectment, an ejectment suit for the said plaintiffs was brought by S. Duffield Mitchell, administrator *d. b. n. c. t. a.* of James S. Stevenson, deceased, under whose will Amanda and the plaintiffs claimed, respectively as primary devisee and devisees over, on March 20, 1893, in the Court of Common Pleas No. 2 of Allegheny County, for the recovery of the lots in controversy.

Said ejectment suit was not reached for trial in said Court until May 21, 1894, at which time a special verdict of the jury was entered in favor of the plaintiff therein for the land described in the writ, subject to the opinion of the Court on the question of law, reserved upon the facts therein specially set forth, and, on July 25, 1894, the said Court entered judgment for the defendants *non obstante veredicto.*

An appeal was forthwith taken to the Supreme Court of Pennsylvania to reverse said judgment, and, on January 7, 1895, the said Court affirmed the judgment of said Court of Common Pleas.

On February 2, 1895, the above named plaintiffs, in their own right, brought a second action of ejectment in the Circuit Court of the United States for the Western District of Pennsylvania against the above named defendants to recover the lots in controversy.

Said ejectment suit was tried on May 25, 1895, by agreement of counsel before said Court without the intervention of a jury, and on August 2, 1895, said Court awarded judgment in favor of defendants, and judgment was entered accordingly.

On August 31, 1895, a writ of error therein was allowed to the United States Circuit Court of Appeals for the Third Circuit, and on January 2, 1896, said Court certified certain questions or propositions of law, concerning which it desires the instruction of your Honorable Court for its proper decision of this cause, which certificate was filed and docketed by the Clerk of the Supreme Court of the United States on February 5, 1896.

An application has been made herewith to your Honorable Court for a writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit to certify to your Honorable Court a full and complete transcript of the record and all proceedings of the said Court of Appeals in this case, to the end that the whole record and cause may be reviewed, considered and determined by your Honorable Court.

Under the fourth section of the Act of Assembly of Pennsylvania, dated April 13, 1807, two verdicts and judgments thereon in ejectment on the same title, between the same parties or their assigns, are conclusive of the title: *Drexel vs. Man, 2 Pa. 267.* And this is the rule in the

United States Courts applicable to ejectment suits in Pennsylvania: *Gibson vs. Lyon, 115 U. S. 439.*

It is the rule in Pennsylvania that in trespass for *mesne* profits after judgment in ejectment, the plaintiff can recover only for what had accrued within six years previous to the commencement of the action of trespass; for all rents, issues and profits accruing previously thereto, the Statute of Limitations is a bar: *Hare vs. Fury, 3 Yeates 13; Hill vs. Meyers, 46 Pa.* 15.

The value of the lots in controversy in this case is great; the annual rental value thereof must, therefore, be large, and in the event of a decision of this case in favor of the plaintiffs by your Honorable Court, the plaintiffs must bring another action of ejectment in order to make conclusive in their favor the title to the lots in controversy.

The Statute of Limitations will commence to run on September 28, 1897, in bar of plaintiffs' right to recover in trespass for *mesne* profits from the land in controversy, and after said date all *mesne* profits, which have accrued more than six years prior thereto, cannot be recovered by plaintiffs.

The number of cases upon the docket of your honorable Court, prior to that of the plaintiffs in this case, is such that this case cannot be reached for oral argument in the regular order before two years from the date hereof, and, in the event of a decision of this case in their favor, the plaintiffs, by the plea of the Statute of Limitations as aforesaid will be compelled to lose a large amount of money, which by law they would be entitled to recover as *mesne* profits.

SECOND: The plaintiffs had reason to expect a final determination of this case by the United States Circuit Court of Appeals for the Third Circuit, according to the intendment of the Act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, and the action of said Circuit Court of Appeals in certifying the questions or propositions of law for the instruction thereon of this Honorable Court, will postpone the final determination of this case for an undue length of time, and to the possible great pecuniary loss of plaintiffs, although they have been diligent in prosecuting their suits in ejectment for the recovery of the lots in controversy.

THIRD. The questions involved in this case are of great importance and present to this Court the construction of a will, which, in three opinions already filed, construing it, has been found to be susceptible of three different and contradictory interpretations.

JOHN S. FERGUSON,
S. DUFFIELD MITCHELL,
Counsel for Plaintiffs.

State of Pennsylvania,
County of Allegheny. } *ss.*

S. DUFFIELD MITCHELL, being duly sworn, says, that he is one of the attorneys and of counsel for the above named plaintiffs, and as such has had personal charge for them of this case in the Circuit Court of the United States for the Western District of Pennsylvania, and in the United States

Circuit Court of Appeals for the Third Circuit, and that such facts as are alleged in the above reasons in support of said motion are true and correct to the best of his knowledge, information and belief.

Sworn and subscribed to before me this 20th day of Feb., 1896. H. D. GAMBLE.

S. DUFFIELD MITCHELL.

Clerk of the Circuit Court of the United States for the Western District of Pennsylvania.

[SEAL.]

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Supreme Court of the United States.

431.

No. 885 OCTOBER TERM, 1895.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH, and MARY ANN LEECH, his Wife, in right of said Wife, EDWARD P. CLARKE, GEORGE HEPBURN WATSON, and ANNE TOWNSEND WATSON, his Wife, in right of said Wife, and CARVER WORTHINGTON BARBER, Plaintiffs in Error,

(Plaintiffs below)

VERSUS

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY, and THE PENNSYLVANIA COMPANY, Lessee, Defendants in Error,

(Defendants below.)

On a Certificate from the United States Circuit Court of Appeals for the Third Circuit.

ARGUMENT FOR PLAINTIFFS IN ERROR.

WILLIAM T. BARBER,
of Counsel.

JOHN S. FERGUSON,
S. DUFFIELD MITCHELL,
Attorneys.

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(16,175.)

SMITH BROTHERS, FRANKLIN PRINTING OFFICE, 405 GRANT STREET.

SYNOPSIS OF ARGUMENT.

Is the decision of the Supreme Court of Pennsylvania, construing this will, conclusive?

The question implies that this case and the case before the Pennsylvania court involve identical facts; paragraph 2 of the certificate of the Circuit Court of Appeals contains facts in this case only. ..... Page 20.

Assuming the facts in both cases to be identical, the rule is that the federal court does not follow the construction of a will by a state court: *Lane vs. Vick*, 3 How. 464, 476. ..... Pages 20 to 22.

To maintain the argument that the 34th sec. of the judiciary act obliges the federal court to follow the state court decisions, the word "laws" must include within its meaning the *decisions* of the local tribunal. Decisions are only *evidence* of the law, and not themselves the law..... ..... Pages 20 and 25.

If the decisions are only evidence of the law, then this court accepts and follows only well settled decisions and those established by precedent. ..... Page 25.

If the decisions are the law, then this court must follow them, though they be conceived in fraud or bias, or be the result of bad reasoning. ..... Page 25.

The federal court follows the *rule of property* established by the state court, and not the construction of a particular will. ..... Page 21.

This court refused to follow the decision of a state court upon the identical statute under consideration in this court, because "*in opposition to our views of the law*;" .. Page 23;

and in another case refused so to do, because "*we are not able to adopt its conclusions.*" ..... Page 24.

The purpose of conferring upon federal courts jurisdiction in suits between citizens of different states was to institute independent tribunals to protect non-resident litigants against local prejudice, and, if the adjudications of state tribunals are conclusive in the federal court, this purpose would be defeated..... Page 26.

If the Pennsylvania case were here upon writ of error to the supreme court of Pennsylvania, this court would determine for itself the construction of the will without reference to the local court's adjudication thereon. ..... Page 26.

Folsom vs. Ninety-six, 159 U. S. 611, laid down the general principles governing the decision of this question in this case..... Page 27.

In *Burgess vs. Seligman*, 107 U. S. 20, 33, this court refused to reverse the circuit court's construction of a state statute, subsequently construed otherwise by the local court..... Page 28.

The principle of *Britton vs. Thornton*, 112 U. S. 526, was opposed to the rule of construction adopted by the Pennsylvania court in this case..... Page 29.

This court will follow the construction by a state court of a statute rather than its construction of a particular will..... Page 30.

Britton vs. Thornton, supra, was constructive of a Pennsylvania will, in which was language substantially the language of this will; that decision is opposed in reasoning to the decision of the Pennsylvania case upon this will..... Pages 31 to 33.

The supreme court of Pennsylvania suppressed a full argument of this case by refusing to hear counsel for appellees, and decided the case upon a principle which the court of common pleas said had no merit, which plaintiffs in error consequently never argued on their brief, and were not allowed to argue orally... Pages 34 & 35.

The Pennsylvania decision is unsound in reasoning and against all authority..... Page 35.

The court read the preamble of the will in connection with the specific devise, and thus *inferred* an absolute estate, and then pronounced the devise over merely substitutionary in character. . . . . Page 36.

This substitutionary construction to prevent lapse is applied only from necessity; is an artificial rule and is founded largely upon authority rather than upon principle. . . . . Pages 37 and 38.

It is applied only where the primary devise is *expressly* in fee-simple. . . . . Page 38.

The preamble of the will alone is not a safe means of reaching the testator's intention. . . . . Page 39.

Disencumbering the sentence of the marriage condition is never resorted to when the substitutionary construction is applied. . . . . Pages 40 and 41.

There is no rule of construction arising from *possible delay in vesting* of a gift, which controls the natural meaning of the terms of the bequest. . . . . Page 41.

Because of Amanda's extreme youth, the testator could not have had in contemplation the substitutionary construction. The Pennsylvania court's declaration to the contrary is against authority. . . . . Page 42.

The cases relied on by the defendants in error, in defence of the judgment of the Pennsylvania court, do not apply to the language and facts of this case; they were decided for reasons which do not appear here; those cases considered. . . . . Pages 43 to 48.

The Pennsylvania decision cannot control either as *res adjudicata* or as an *authoritative* decision of the local court upon a question of title to real estate: *Gibson vs. Lyon*, 115 U. S. 439, 445. . . . . Page 50.

The facts of the second paragraph of the certificate render it impossible to follow the Pennsylvania decision. . . . . Page 51.

The publication of the will on the day of testator's death unquestionably proves that he, *at no time*, intended the application of the substitutionary construction to his will, to prevent lapse of Amanda's devise. . . . . Pages 52 and 53.

What estate did Amanda Stephens take under the devise?

The description of Amanda in the will is strong evidence that she was base born; it was sought to prove by exemplifications of record that her name was changed from *Stephens* to *Stevenson;* this was a strong fact to show illegitimacy. She being *filius nullius*, testator never intended her to take either an absolute fee simple or a fee tail in the lots; it was his plain intention that she should take a defeasible fee with an executory devise over. . . . . Pages 55 to 58.

Chief Justice Wilmot demonstrates that the application of the *legal sense* of "dying without issue" attains the same result as "dying with issue"; either death without issue or death with issue defeats the devise over; and death without issue defeats the testator's intention. . . . . Pages 59 and 60.

Courts "seize upon any expression or circumstance in the will" to give the popular construction to the words "*die without issue.*" . . . . . Pages 61 to 63.

Offspring here means *children*; this is its usual meaning; therefore, by expression the failure of issue is definite. . . . . Page 63.

The three opinions in this case emphasize how radically courts may differ in the construction of a simple will; the common pleas court held that an indefinite failure of issue was intended, because the context of the will did not overcome that presumption from the use of the words "die without legitimate issue," and that "heirs" of John Barber was too indefinite a term to mean his children: the supreme court of Pennsylvania held that an indefinite failure of issue was not intended, and that "heirs" of John Barber meant his children: the circuit court held that a devise over to *living persons* upon a failure of issue generally, does not import a definite failure of issue, and that if the devise to Amanda was not a fee simple, it was at least a fee tail. . . . . Pages 64 and 65.

The deciding principles of *Middleswarth vs. Blackmore* are authority for this case; the cases compared. . . . . Pages 65 to 68.

It is a rule of property in Pennsylvania that a direction to sell the lots at Amanda's death indicates a definite failure of issue; the supreme court of Pennsylvania applied such rule in this case. .....Pages 69 to 72.

A power of sale without limit is void because contrary to the rule against perpetuities; a testator will not be presumed to have intended such absurdity. As between a void power and a good power the court will choose the latter as probably intended by a testator..... ..... Page 73.

Directions for the payment of money upon the decease of the devisee, upon failure of whose issue the estate is given over, are always held to be presumptive of a definite failure of issue, and are nearly allied to powers of sale to be exercised at the death of the first taker without issue.....Pages 74 and 75.

"Heirs of John Barber" means *children* of John Barber—he being recognized in the will as alive. The supreme court of Pennsylvania so construed the words..... .....Pages 75 to 78.

Combining *death without offspring* with *death unmarried* restricts the failure of issue to a definite time: *Johnson vs. Johnson*, 8 Ex. 81.....Pages 78 and 79.

The earlier Pennsylvania cases of devises over upon death without issue followed this rule.....Page 80.

The Pennsylvania cases of bequests over upon such death have always followed this rule.....Page 80.

The later Pennsylvania cases of devises over upon such death seem to have departed from the rule of the earlier cases, though this departure has been much deprecated by the Pennsylvania judiciary; see strong criticism by Justice Sharswood.....Pages 80 to 84.

General authority is in harmony with the earlier Pennsylvania cases.....Pages 84 and 85.

When the decisions of the state courts are not consistent, this court does not feel bound to follow the last, if it is contrary to its own convictions: *Pease vs. Peck*, 18 How. 595, 599.....Page 97.

Effect must be given to every word of a will and none must be rejected in the construction of it. The word *unmarried* cannot be read out of the will without doing violence to the language of the testator. . . . . Pages 85 to 88.

"*In the event of*" Amanda's death means *at* or *upon* her death without issue; the testator has twice elsewhere used the phrase in that sense, and under the rule of law it must have that sense in case of Amanda's death. . . . . Pages 88 to 90.

The devise over *at* or *upon* Amanda's death without offspring must be upon a definite failure of issue, because such failure is always contemplated by a devise over *at* or *upon* death without issue. . . . . Pages 91 to 93.

"Then" is an adverb of time and emphatically marks the time of Amanda's death as the period of failure of her issue. . . . . Page 93.

It has this sense of time in case of bequests over. . . . . Pages 93 to 95.

While *per se* it might be insufficient to restrict the failure of issue in case of a devise over, it must have the same *meaning* in case of a devise as in case of a bequest; it is, therefore, one of the *indicia* in this will favoring a definite failure of issue and such effect must be given to it. . . . . Page 98.

The fact that the supreme court of Pennsylvania refused to hold the devise to be a fee tail is a most cogent reason why such construction cannot be applied. . . . . Pages 98 and 99.

This is no stale or concealed claim; plaintiffs have been prompt in seeking to enforce their remedy; defendants assumed the risk of their construction of the will being the correct one; the burden is upon defendants to show that the estate was an entail and that it has been barred in strict conformity with the statute; one who seeks to defeat the lawful intention of a testator has no equity; but this was no estate tail, and defendants have no equity which should weigh in the determination of this question. . . . . Pages 99 and 100.

Supreme Court of the United States.

No. 885 OCTOBER TERM, 1895.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH, and MARY ANN LEECH, his Wife, in right of said Wife, EDWARD P. CLARKE, GEORGE HEPBURN WATSON, and ANNE TOWNSEND WATSON, his Wife, in right of said Wife, and CARVER WORTHINGTON BARBER, Plaintiffs in Error,
(Plaintiffs below)

VERSUS

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY, and THE PENNSYLVANIA COMPANY, Lessee, Defendants in Error,
(Defendants below,)

On a certificate from the United States Circuit Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE.

This was an action of ejectment, brought for the recovery of the lots in controversy against the defendants by plaintiffs, who are children and grandchildren of John Barber, deceased, and who claim by virtue of the devise hereinafter mentioned.

James S. Stevenson, the common source of title, died seized of the land in controversy, on October 16, 1831. His will, dated March 11, 1831, first published on the date of his death, in the presence of subscribing witnesses, after a dangerous illness for two preceding weeks, and probated on

October 18, 1831 contains the following provisions, which give rise to this litigation:

"I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69 and 70 in the city of Pittsburgh, in their full extent, bounded, etc. * * * * (description includes the property in suit in this case.) Said Amanda Stephens is now five years old (born April 7, 1826). Stephens and his wife, the parents of Amanda's mother, live near Connellsville, in Fayette county, Pa.

In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Penna."

Amanda survived the testator, and in 1847 intermarried with Samuel Haight. In 1848, she and her husband executed a deed for the purpose of barring a supposed estate tail that she had in the lots. By divers *mesne* conveyances the title to said lots became vested in defendants in error.

Amanda had children by her husband, who, as well as the husband, died in her lifetime, without ever having had issue, and she never having married again died on September 21, 1891.

At the time of the death of testator, John Barber was alive, married and had children living, some of whom are plaintiffs in this action.

On March 20, 1893, the administrator d. b. n. c. t. a.of James S. Stevenson, deceased, brought an action of ejectment against these defendants in the Court of Common Pleas of Allegheny County, to recover the land here in controversy, in which action a special verdict was rendered and judgment was subsequently entered for the defendants. Upon appeal to the Supreme Court of Pennsylvania, this judgment was affirmed. The opinion of the said Court of Common Pleas of Allegheny County by Ewing, P. J. and the opinion of the

Supreme Court of Pennsylvania by Chief Justice Sterrett are to be found in the fifth paragraph of the certificate of the United States Circuit Court of Appeals. (See pages 7 and 11 hereof respectively.)

Judge Ewing held that the phrase, "dying without offspring by her husband," has the same effect as dying without legitimate issue, and that the presumption of law therefrom was that testator intended to devise a fee tail, which was not overcome by the other clauses of the will; that "heirs of John Barber" was too indefinite a term to mean his children, and that the age of Amanda, the circumstances and the will clearly showed that the contingency of Amanda's death did not mean her death before testator.

The Supreme Court of Pennsylvania held that the words in the preamble of the will, expressive of a desire to make a distribution of his estate, read in connection with the devise to Amanda, manifested an intention to give her an *absolute* estate; that the gift over was substitutionary in character and meant to take effect only if Amanda should die before the testator; that a remote failure of issue was not contemplated, because (1) the power of sale in the will was supposed to be intended to be exercised at a near time in the future, and because (2) "heirs of John Barber," he being alive, meant his children.

The Supreme Court, while affirming the judgment of the lower court, squarely reversed the reasoning and every legal proposition, advanced by that court.

On February 2, 1895, a second action of ejectment for the same land was brought against the defendants by the plaintiffs herein, in the Circuit Court of the United States, for the Western District of Pennsylvania, in which the court found for the defendants and entered judgment accordingly. Judge Acheson in an opinion, found in the sixth paragraph of the certificate of the United States Circuit Court of Appeals (see page 14 hereof) doubted

the construction applied by the Supreme Court and held that the devise over to named living persons upon the failure of issue of the first taker does not import a definite failure of issue. He refused to decide what effect upon the devise the power of sale had, and ruled that under any aspect of the case the plaintiffs are not entitled to recover.

A writ of error was sued out from the United States Circuit Court of Appeals for the Third Circuit, sitting at Philadelphia. The case was argued before that tribunal on November 11, 1895, and on January 2, 1896, it was sent upon certificate to this court for instruction upon certain questions or propositions of law propounded.

CERTIFICATE.

This was an action of ejectment and comes before this Court on a writ of error to the United States Circuit Court for the Western district of Pennsylvania, which entered judgment for the defendants.

FIRST. The parties to the action both claimed title to the land in controversy under the will of James S. Stevenson, deceased, dated March 11, 1831, which is in the words following, to wit:

"I, James S. Stevenson, of the city of Pittsburgh, in the State of Pennsylvania, aged fifty years on the 12th day of January, 1831, reflecting on the certainty of death and desirous of making a distribution of my property in the event of my decease, do hereby declare this writing to be my last will and testament, made this twelfth day of March, in the year of our Lord one thousand eight hundred and thirty-one.

"I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69 and 70, in the city of Pittsburgh, in their full extent, bounded by Penn street, Wayne street, the Allegheny River, and by lot 71. Said

Amanda Stephens is now five years old (born April 7, 1826). Stephens and his wife, the parents of Amanda's mother, live near Connellsville, in Fayette County, Pennsylvania.

"In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Penna.

"I give and bequeath to John Barber, of Columbia, and to his heirs the lots in the city of Pittsburgh, numbered 71 and 72, bounded by Penn street, by lot 70, by the Allegheny river and by lot 73.

"I give and bequeath to Mary Livingston's children the lot 74 in the city of Pittsburgh. And to her unmarried sister, Eliza Stevenson, I give and bequeath the lot 73 in the city of Pittsburgh, and in the event of her death the lot to go to her sister's children. Mary Livingston and Eliza Stevenson are daughters of the late Colonel S. Stevenson, son of Robert Stevenson, of York County, Pa.

"I give and bequeath to the sons of James Stevenson, formerly of York County, but who died in Lycoming County in 1810 or 1811, the brick and other buildings with the ground on which they are erected, situated at the corner of Wood and Fifth streets, Pittsburgh. These sons are Stephen, Manning, Ruben, Samuel and I. Stevenson.

"All the remainder of my property to be sold and after paying my debts to be divided into sixteen shares and to be disposed of as follows: To Amanda Stephens one share, to Mary Livingston, one share, to Eliza Stevenson one share, to Stephen Stevenson, within named, one share, to James Wright, of Columbia, or his heirs, two shares, to John Barber, of Columbia, two shares, to Ann Elliott, formerly Ann West, now wife of Rev. Mr. Elliott, of Washington county, one share, to Jane E. Thecker, niece of the late

Rev. Mr. Kerr, one-sixteenth (or one share), to the heirs of John Barber, of Columbia, two shares, to the heirs of James Wright, of Columbia, two shares, to Charles Avery, J. M. Snowden and John Thaw, to be divided equally, two shares.

"I hereby constitute and appoint the said Charles Avery, J. M. Snowden and John Thaw and John Barber the executors of this my will.

"Signed at Pittsburg this 11th day of March, 1831.

Witness. "JAS. S. STEVENSON,

"GEO. OGDEN,

"J. S. CRAFT."

SECOND. That on the 16th day of October, 1831, when confined to his room by sickness, and after a dangerous illness for two weeks preceding his death, the testator, though he had theretofore signed his will, first published the same in the presence of witnesses, whom he called to attest it, and a few hours thereafter died, and this will, on the 18th of October, 1831, was duly probated, which facts as to the time and circumstances of publication were not found by the special verdict, on which judgment was entered in the ejectment suit in the State Courts of Pennsylvania.

THIRD. That the said Amanda Stephens, then a child of five years of age, survived the testator, and in 1847 intermarried with Samuel Haight; that in 1848 she and her husband executed a deed, intended to bar a supposed estate tail in the land covered by the devise, which, upon the assumption that she had taken an estate tail, would have been sufficient for that purpose; that she had children by her said husband, who, as well as her husband, died in her lifetime, and that she died, never having married again, on September 21, 1891, but she and her husband in their lifetime, and after said steps to bar the entail, conveyed in fee simple to the defendants and others the property here in dispute.

FOURTH. That at the date of the death of the testator, John Barber was alive, married, and had children, some of whom are plaintiffs in this action.

FIFTH. That on March 20, 1893, S. Duffield Mitchell, adm'r. d. b. n. c. t. a. of James S. Stevenson, deceased, brought an action of ejectment against these defendants in the Court of Common Pleas in and for Allegheny county, Pennsylvania, to recover the land here in controversy, in which action a verdict was rendered under the direction of the Court for the defendants, on which judgment was entered accordingly; that on writ of error to the Supreme Court of the State this judgment was affirmed.

OPINION BY EWING, P. J.

"This case has been ably and exhaustively argued on both sides. The question of law arises on the construction of the will of James S. Stevenson, who died October 16, 1831, aged 51 years, having a few hours before his death made his last will, dated, however, March 12, 1831, written by himself. The original will is without punctuation. The facts as to its execution appear from the probate endorsed on the will.

THE WILL.

"I, James S. Stevenson, of the city of Pittsburg, in the State of Pennsylvania, aged fifty years, on the 12th day of January, 1831, reflecting on the certainty of death, and desirous of making a distribution of my property in the event of my decease, do hereby declare this writing to be my last will and testament, made this 12th day of March, in the year of our Lord one thousand eight hundred and thirty-one.

"I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69 and 70, in the city of Pittsburg, in their full extent, bounded, &c. (Description includes the property in suit in this case.)

"Said Amanda Stephens is now five years old (born April 7, 1826). Stephens and , his wife, the parents of Amanda's mother, live near Connellsville, Fayette Co., Penna.

"In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Penna."

John Barber, of Columbia, Pa., was named as one of the executors.

The will proceeds thereafter to make other devises and bequests specifically, and contains a provision that all his remaining property shall be sold and the proceeds divided amongst legatees named.

The special verdict finds that Amanda Stephens married Samuel Haight and had offspring by her husband, five children, one of whom married, but all of whom died before their mother, without leaving offspring; that Samuel Haight died before his wife Amanda, who died September 28th, 1891.

Also, that if the will created an estate tail in Amanda Stephens, the entail was duly barred by deed, dated July 27, 1848, and proceedings thereon, and that by sundry *mesne* conveyences the title of Amanda Stephens, freed from entail, became vested in the defendants.

The testator evidently intended to dispose of all his property. The devise to Amanda Stephens, followed by the limitations over or without them, created a fee, whether in tail or contingent, The circumstances, the age of the devisee, and the will leave us in no doubt that the contingency of Amanda's death did not mean her death before the testator.

What is the true and legal meaning of the words 'dying without offspring by her husband'? Legally, if not defined by other parts of the will, we take offspring to mean descend-

ants, however remote: *Thompson vs. Beasley*, 3 Drew. 7; *Young vs. Davies*, 2 Dr. & Sm. 167; *Allen vs. Markle*, 36 Pa. 117.

Webster defines it 'that which is produced, especially a child or children; descendants, however remote from the stock.' The Century Dictionary says, 'progeny; descendants however remote from the stock; issue; a collective term applied to several or all descendants.'

True, it may be confined to children, as in *Lister vs. Tidd*, Bevans' Report, vol. 29, page 618, in a division of money at death of widow. In the present case we interpret the phrase 'dying without offspring by her husband' to have the same legal effect and force as the words 'dying without legitimate issue' or 'heirs of her body.' They are words of limitation, not of purchase.

Does the will of James S. Stevenson refer to a definite or an indefinite failure of issue or offspring of Amanda Stephens?

To undertake to cite and still more to reconcile the numerous decisions on this general question would not only be confusing and interminable, but to any clear-headed lawyer it is impossible. The decisions are irreconcilable.

But there are general rules well established, which govern this case. That the words, "dying without issue," or "without legitimate issue," standing alone and uncontrolled by other parts of the will, "import an indefinite failure of issue is well established, and in all the departures from fundamental rules" it has not been shaken in this state: Eichelberger vs. Barnitz, 9 Watts 447, being the leading case, affirmed in Middleswarth vs. Blackmore, 74 Pa. 414, and in all subsequent cases when the question has been raised. *Prima facie*, then, on the settled rule of interpretation, this phrase in the will imports an indefinite failure of issue.

Another canon of interpretation is properly invoked by the plaintiffs, to wit, that the intention of the testator must govern, and if from reading the whole will it is apparent that the testator meant, and has potentially said, that the devise over is to take effect in case the first taker dies leaving no issue living at the time of her death, it is a definite failure of issue.

Middleswarth's Administrator vs. Blackmore, 74 *Pa.*, 414, was a case of this kind, where each of several provisions of the will pointed distinctly to a distribution at the death of Jonathan without issue living at his death, and all these provisions, taken together, showed clearly and conclusively that that was the intention of the testator.

Is this such a will? Counsel for plaintiffs have made a very ingenious argument in the affirmative, and, while the case is not free from doubt, they have failed to convince us that the intention of the testator was different from the ordinary legal import of the terms used in the devise.

The arguments mainly are, that it must be presumed that he intended the event to occur, if at all, in the lifetime of his executors named, who would then sell the property and divide the proceeds; also that testator in the devise uses the words "in the event of" Amanda dying, &c., and that he uses these words in the preamble of his will, "in the event of my dying," and in the second paragraph of the will, in the event of her (Eliza Stevenson) death. In these two other cases referring to what is to be done immediately upon the death; that he, in declaring what was to be done in the contingency of Amanda's death, must have intended at and immediately after her death. It may be he did so intend, but we start with the presumption, the legal rule of interpretation, against it, and in our opinion it is not overcome by the other clauses.

The legatees of the proceeds of the property, if sold, were not necessarily in being or known to testator; it is to the heirs of John Barber; the same words he uses in

another part of the will, "John Barber and his heirs," evidently in the latter not meaning children.

If an indefinite failure of issue was intended, the fact as to Amanda having had offspring or her having survived them is immaterial.

We are of the opinion that the will of James S. Stevenson devised an estate tail in the property in question to Amanda Stephens, which, having been duly barred and the title conveyed to the defendants, they have a good title to the property and the plaintiff has no title thereto.

And now, 25th of July, 1894, after argument and upon consideration, the Court being of the opinion that the law is with the defendants, judgment is entered in favor of the defendants *non obstante veredicto*."

OPINION BY MR. CHIEF JUSTICE STERRETT,

January 7, 1895.

"Although the devise to Amanda Stephens was made before the Act of 1833 and without words of inheritance, yet when read in connection with the introductory clause of James S. Stevenson's will, there is a plain intent manifested in the first instance to give her an absolute estate. In *McCullough vs. Gilmore*, 11 Pa. 370, where substantially the same expression was used, this court said: 'These words and the like of them are generally carried down into the corpus of the will to show that the testator meant to dispose of his whole interest in a particular devise, unless words are used, which plainly indicate an intent to limit it.' Numerous cases to the same effect are cited in *Schriver vs. Meyer*, 19 Pa. 87. The first taker is always the favorite object of testator's bounty, and as such entitled to the benefit of every implication.

There are no words used in the second paragraph of the will, containing the devise to Amanda, which indicate any intent to limit her estate. Had the will stopped there,

the devise would unquestionably have been absolute. The following paragraph was not intended to operate by way of limitation, but was manifestly substitutionary in its character. The thought would very naturally occur to testator to make an alternative devise for the contingency of Amanda's dying without issue: *Biddle's Ap.*, 28 Pa. 59; and this was, in effect, what was done. 'In the event,' said testator, 'of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally amongst the heirs of John Barber.' The word 'offspring' here used is but a synonym for 'issue,' and issue cannot be lawful without marriage. The devise is then in the first instance to Amanda, and in the event of her dying without issue, over to alternative beneficiaries. Dying without issue was thus made the contingency upon which the substituted beneficiaries could take: *Coles vs. Ayres*, 156 Pa. 197. But death when? Where, as here, there is nothing to indicate an adverse intent, additional limitations dependent on no other contingency than is implied from the language, 'if any of them die', or 'in case of death', or the like cannot be referred to the event whenever it may happen, for that would be to give a forced construction to the words, but must be construed as referring to death in association with some additional circumstance, which makes it actually contingent; that circumstance is said to be naturally in regard to the time of happening, and that time, where, as here, the gift is immediate, is necessarily the death of the testator, there being no other period to which the death can refer: *Caldwell vs. Skilton*, 13 Pa. 152.

This view is strengthened by the presumption that in the absence of a fixed period the power of sale was intended to be exercised at a near rather than a remote period after testator's death: Hill on Trustees, 474. The circumstances, which gave rise to the creation of the power, must necessarily change and perhaps entirely disappear in a lapse of

time. 'A power of sale without limit would doubtless,' said Mr. Justice Clark, in Wilkinson vs. Buist, 124 Pa. 253, 261, 'be bad under the rule against perpetuties, and a testator will not be presumed to have intended anything so absured.' The intended exercise of the power of sale given in this will is referable to the period either of (1) testator's death, or (2) a definite, or (3) an indefinite failure of issue. The last may at once be dismissed as too remote; while, as between the other two periods, it is scarce within the range of probability that testator should have intended sale after a long life. The change of circumstances might be radical, whereas at testator's death the change would in all probability be relatively small.

Another consideration of weight is that testator had in view living persons as substituted beneficiaries—the gift over is to the 'heirs,' and therefore the children of John Barber, who was living—and the natural inference is he intended them to take as such.

The suggestion that because of Amanda Stephens' extreme youth testator could not have had in contemplation the contingency of her marriage and death without issue in his lifetime, is without merit. No presumption could arise from the fact of making a will that testator expected to die before she should attain a marriageable age. So far as appears from the record he may have had an expectation of long life, but, whatever his expectations, he expressly meets both aspects of the case by providing that 'in the event of her dying unmarried, or, if married, dying' without issue, the estate should go over. She might die in her infancy unmarried, or marry and die leaving no issue in his lifetime, and the gift over to the substituted donees would prevent lapse.

There is no reason for discrimination against her on account of age. She was the favorite object of the testator's bounty, and, having survived him, became thereupon seized of the absolute estate intended for her.

The judgment of the court below should therefore be affirmed.

SIXTH. That on the 2nd day of February, 1895, a second action of ejectment for the same land was brought by the plaintiffs in this suit in the Circuit Court of the United States for the Western District of Pennsylvania, in which a verdict under the direction of the court, was rendered for the defendants, on which judgment was entered accordingly; to which judgment a writ of error was sued out from the Circuit Court of Appeals of the Third Circuit, being the writ of error upon which the questions now to be submitted have arisen.

OPINION OF THE COURT.

Acheson, Cir. J.:

The parties to this suit respectively claim title to the land in controversy under the following provisions of the will of James S. Stevenson, deceased:

"I James S. Stevenson, of the city of Pittsburg, in the State of Pennsylvania, aged fifty years, on the 12th day of January, 1831, reflecting on the certainty of death, and desirous of making a distribution of my property in the event of my decease, do hereby declare this writing to be my last will and testament, made this twelfth day of March, in the year of our Lord one thousand eight hundred and thirty-one.

I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69 and 70, in the city of Pittsburg, in their full extent, bounded by Penn street, Wayne street, the Allegheny river and by lot 71. Said Amanda Stephens is now five years old (born April 7th, 1826). Stephens and , his wife, the parents of Amanda's mother, live near Connellsville, Fayette Co., Pennsylvania.

In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Penn'a."

The testator died October 16th, 1831. His will was probated on the 18th day of the same month and year.

Amanda Stephens survived the testator, and in the year 1847 intermarried with Samuel Haight. On July 27th, 1848, Amanda and her husband, by deed to Jacob Haight, executed, acknowledged and recorded, agreeably to the provisions of the statute for barring estates tail, barred any estate tail that Amanda had in the devised lots of ground. Afterwards the title of Amanda, freed from any entail, became vested in the defendants.

Amanda had several children by her husband, Samuel Haight, but they all died in the lifetime of their mother, without having had issue. Amanda died September 28th, 1891. Her husband died previously.

The plaintiffs are children and grandchildren of John Barber, deceased. Their position is that Amanda Stephens took no greater estate in the devised lots of ground than a qualified fee, defeasible in the event of her dying without offspring by her husband surviving her, and this event having happened, that the devise over to the heirs of John Barber took effect.

The defendants insist primarily that Amanda took an estate in fee simple; but if not, then they contended that she took at least an estate in fee-tail.

The will of James S. Stevenson was considered by the Supreme Court of Pennsylvania in the case of *Mitchell, administrator, vs. The Pittsburg, Fort Wayne & Chicago Company, et al.*, 165 Pa. 645. The Court held that, although the testator died before the Wills Act of 1833, the words in the preamble of his will, 'desirous of making a

distribution of my property,' showed an intent to dispose of his whole interest and were to be carried down into the body of the will, and that those words imported an intent to give to Amanda an estate in fee-simple in this particular property, notwithstanding the devise over to 'the heirs of John Barber'; that the contingency upon which the estate was to go to them was the death of Amanda 'without offspring by her husband' in the lifetime of the testator, and that Amanda, having survived him, took a fee-simple. The defendants maintain that this decision is conclusive here, but to that proposition we are not able to assent. A single verdict and judgment in ejectment in Pennsylvania, not being conclusive in the courts of the State, is not conclusive in the courts of the United States: *Gibson vs. Lyon*, 115 U. S. 439. This decision of the Supreme Court of Pennsylvania, indeed, as a precedent, is entitled to peculiar regard, and we would be disposed to follow it, even though we might doubt the correctness of the construction which that court gave to the devise to Amanda Stephens.

The plaintiffs, however, have introduced (under exceptions) some evidence that was not, it seems, before the courts in the former litigation, with reference to the state of facts under which, as they allege, the will of James S. was made—facts which they contend are competent aids in construing the will, and call for a different conclusion from that reached by the Supreme Court of Pennsylvania. On the strength of this evidence it is asserted, in the first place, that Amanda Stephens was the natural child of James S. Stevenson. We are of opinion, however, that there is no competent evidence to establish the truth of this allegation, if it be material. The declarations here mainly relied on were made by a person, who was not related either by blood or marriage to James S. Stevenson, and they were made many years after his death. Again, the plaintiffs claim to have shown that Stevenson was dangerously ill for two weeks preceding his death, and of this we think there is satisfac-

tory evidence. Then they have offered the register's record of the probate of the will, which sets forth that the two attesting witnesses deposed before him, that on the 16th day of October, 1831, the date of Stevenson's death, as appears *aliunde*, they subscribed their names to the will as witnesses, at the request and in the presence of the testator, who then declared that it was his last will and testament. As this probate was the judicial act of the register, and both sides claim under it, we incline to think that the contemporaneous and customary record made by the register in the course of his official duties, is competent evidence to show the date on which the testator caused the will to be attested and published in the presence of the subscribing witnesses; but upon the question whether the evidence here relied on warrants a different construction of the will from that adopted in *Mitchell, Adm'r. vs. The Pittsburg, Fort Wayne and Chicago Railway Company, supra.*, we do not feel called upon to express an opinion. If we were to hold that the devise to Amanda Stephens did not pass to her an estate in fee simple, this conclusion would not help the plaintiffs, for we cannot agree with them in their contention that Amanda took only a defeasible fee. In our view of this will, if Amanda did not take a fee simple, she took at least an estate tail.

'Offspring' is a word of limitation, not of purchase: *Allen vs. Markle*, 36 Pa. 117. Speaking of the devise in question, the court, in *Mitchell. adm'r, vs. The Pittsburgh, Fort Wayne & Chicago Railway Company, supra*, said: 'The word 'offspring' here used is but a synonym for 'issue,' and issue cannot be lawful without marriage. The devise is, then, in the first instance to Amanda, and, in the event of her dying without issue, over to alternative beneficiaries.' In *Vaughan vs. Dickes*, 20 Pa. 509, the testator, after a devise to his wife for her life, directed as follows: 'And after the decease of my said wife I give, bequeath and devise all the aforesaid real estate, above described, to my son,

Peter Dickes, and daughter, Catharine Albertson, to them and their heirs forever, share and share alike, equally to be divided between them; * * * and it is further my will that should my son, Peter Dickes, not marry and have lawful issue, then the said real estate, heretofore devised to him, shall go to my said daughter, Catharine Dickes, and her heirs forever.' The court held that these words created an estate tail in Peter. In *Matlack vs. Roberts*, 54 Pa. 148, the court decided that the words, 'I give and devise to my sons all the residue of my estate, real and personal, * * * and in case of the death of either of my children unmarried or without issue, then I do order that the share of said child or children so dying may be divided equally among my surviving daughters or their heirs,' created an estate tail in the sons. The authority of these decisions is unshaken. It will be perceived from the above quotation from the opinion in *Mitchell, adm'r, vs. The Pittsburgh, Fort Wayne & Chicago Railway Company, supra*, that the court treated the word 'unmarried' as unimportant, holding that the devise over was in the event of Amanda's dying without issue.

Now, it is firmly established by an unbroken line of authorities, among which are *Vaughan vs. Dickes, supra*, and *Matlack vs. Roberts, supra*, that a devise over to named living persons upon the failure of the issue of the first taker does not import a definite failure of issue. In the leading case of *Eichelberger vs. Barnitz*, 9 Watts 447, 449, the devise, which there was adjudged to create an estate tail, contained these words: 'And further my will is, because my son Henry is not yet married, that if he should die without leaving any lawful issue that then his full share shall fall or go in equal share to my three other children, Adam, Mary Ann and Susannah, to one of them as much as to the other.' Here the devise over was not only to named living children of the testator, but it was to them distributively in equal shares. To hold at this late day that such a devise over imports a definite failure of issue would shake a multi-

tude of titles. The authority of *Eichelberger vs. Barnitz, supra*, was fully recognized in the recent case of *Hackney vs. Tracy*, 137 Pa. 53. The case of *Middleswarth vs. Blackmore*, 74 Pa. 414, was decided upon the peculiar provisions of the will there involved. It does not furnish a rule for this case. Amanda Stephens was the preferred object of the testator's bounty, and the construction should incline toward making the gift as effectual to her as possible. We are satisfied that upon any admissible construction of the will of James S. Stevenson the title to the land in dispute is in the defendants."

Buffington, J., concurs.

The said Court of Appeals, desiring the instruction of the Supreme Court of the United States for its proper decision of the following questions or propositions of law, respectfully certifies the same:

1st. Is the decision of the Supreme Court of Pennsylvania before referred to conclusive? If not, then,

2d. What estate did Amanda Stephens take under the devise?

ARGUMENT.

Is the decision of the Supreme Court of Pennsylvania, construing this will, conclusive?

This inquiry would imply that the facts of the present case are the same facts, found by the special verdict in the case before the Pennsylvania court. This case possesses all the facts of that special verdict and the additional facts, stated in the second paragraph of the certificate of the United States Circuit Court of Appeals (see page 6 hereof.) Upon the assumption that the facts of the two cases are identical, plaintiffs in error contend that under the authorities of this court, the rule is, that the mere construction of a will by the state court does not constitute a rule of decision for the courts of the United States.

This question has arisen chiefly as to the obligation of this court to follow the construction by local courts of state statutes. It will be shown that this court is, with better reason, under less obligation to follow the construction by a state court of a particular will.

The thirty-fourth section of the judiciary act of 1789, ch. 20, provides "that the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." In order to maintain the argument, that this statutory provision renders it obligatory upon this court to follow the decisions of the state courts, it is necessary to hold that the word "*laws*" includes within its meaning the *decisions* of the local tribunals. It is said that in the ordinary use of language it cannot be claimed that the decisions of courts constitute laws. At most, they are only *evidence* of what the laws are, and are not of themselves laws. The laws of a state are

more usually understood to mean the rules and enactments, promulgated by the legislative authority, or long established local customs, having the force of laws. It has been uniformly believed that the true interpretation of the foregoing section of the statute limited its application to state laws strictly local, *i. e.*, to the positive statutes of the state, and the construction thereof, adopted by the local courts, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It has never been held that the section applies, or was intended to apply, to questions of a more general nature, not dependent upon local statutes, or local usages of a fixed and permanent operation; for example, to the construction of ordinary contracts, or other written instruments.

Swift vs. Tyson, 16 Peters 1, 18,

Such being the rule, we may thus illustrate its scope: The Pennsylvania courts, from the first, have followed the English decisions and have held that a devise over upon death without issue, without more, imports an indefinite failure of issue. The Ohio courts, from the first, have repudiated the English decisions and have held that such devise over is a good executory devise upon a definite failure of issue. A testator of New York state in the same clause of his will might devise real estate in Pennsylvania and Ohio, with a gift over upon death without issue. Ejectment suits involving the construction of this devise might come to this court from both Pennsylvania and Ohio. It is beyond question that this court would follow the *rule of property*, established by the Pennsylvania courts, as decisive of that case; and the *rule of property*, established by the Ohio courts as decisive of that case.

But this court would not be bound to follow any one Pennylvania case upon the construction of a particular will. This court might be of opinion that there was sufficient

in the will to except it from the general rule, and even though the Pennsylvania court hold otherwise, it would be the duty of this court to make its own construction of the will, in order justly and reasonably to give effect to the testator's intention. If this be not the rule, then the spirit and purpose of the constitution and laws of the United States are defeated, and there is nothing in the idea of an independent federal judiciary, to which non-residents may resort to avoid local bias.

The federal court is not bound to follow a local court's construction of a will.

While this court will usually adopt the construction of a state statute made by a local court, it has never felt itself bound to follow a local court's interpretation of a will. A will is regarded as a "*written instrument*," which this court may construe according to its own idea of the testator's intention. There are cases, however, in which this court has followed the local court's interpretation of a will, where the opinion was pronounced "*well considered*," and the reasons thereof met with the approval of this court, because in accordance with established precedent.

In *Lane vs. Vick*, 3 How. 464, 476, this court said: "It is insisted that the construction of this will has been conclusively settled by the supreme court of Mississippi, in the case of *Vick et al. vs. The Mayor and Aldermen of Vicksburg*, 1 How. 379. * * * * * * With the greatest respect, it may be proper to say, that this court do not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes. * * * * * * * The construction of a statute by the supreme court of a state is followed, without reference to the interests it may effect, or the parties to the suit in which its construction was involved. **But the mere construction of a will by a state court does not, as a construction of a statue of a state, constitute a rule of decision for the courts of the United States.**

In *Foxcraft vs. Mallett*, 4 How. 353, it was urged in this court that "*this deed and the construction of it have been made the special subject of judicial decision by the supreme judicial court of Maine. The construction of that deed on the very question at issue has been solemnly settled by the highest judicial tribunal, and is no longer an open question;*" and in answer to that argument, Mr. Justice Woodbury said at page 379:

"If it had been, the decision would be entitled to high respect, though it should not be regarded as conclusive on the mere construction of a deed as to matters and language belonging to the common law, and not to any local statute: 3 *Sumner's R.* 136; 277."

In the case of *Swift vs. Tyson*, 16 Peters 1, the effect of the 34th section of the Judiciary Act of 1789, and the construction of instruments by the state courts, are considered with greater precision than is found in some of the preceding cases on the same subject."

Mr. Justice Clifford, in a concurring opinion in the case of *R. R. vs. Nat. Bk.*, 102 U. S. 14, 53, succinctly stated the rule as follows:—

"Where any rule of real property has been settled in the state courts, the same rule will be applied by this court that would be applied by them: *Jackson vs. Chew*, 12 Wheat. 153, 162.

Controversies often arise where this court will refuse to adopt a decision of the state court, as in the construction of a will, unless it appears that the decision has become, by acquiescence, a rule of property in the state: *Lane vs. Vick*, 4 How. 464, 476."

Speaking of the decision of *Swift vs. Tyson*, *supra*, by Mr. Justice Story, he further said "that the court had never supposed that the section applied, or was designed to apply, to the construction of ordinary contracts, or other written instruments, nor to questions of general commercial law.

These views were enforced by many other illustrations, and the court decided—every member of the court, but one concurring—that the section, upon its true intendment and construction, is strictly limited to local statutes and local usages, and that it does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect of which are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence".

In *Thompson vs. Perrine*, 103 U. S. 817, this court refused to follow a decision of a state court, which decided the identical statute under consideration in this court to be

unconstitutional, because it was "*in opposition to our views of the law*," as expressed in numerous cases.

A state court had stamped its judgment upon the construction of its Constitution and laws, involving the validity of the very bonds in suit in this court, in a decision pronounced after the controversy arose, and between other parties, and this court thus spoke of its own duty to follow the state decision:

"When it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the state, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one state, suing in another, the choice of resorting to a federal tribunal: *Burgess vs. Seligman.*

We have, however, considered the reasoning of the supreme court of Mississippi, in its opinion in the case of *Hawkins vs. Carroll County*, with the respect which is due to the highest judicial tribunal of a state, speaking upon a topic as to which it is presumed to have peculiar fitness for correct decision, and, while we are bound to admit the carefulness and fullness of its examination of the question, we are not able to adopt its conclusions."

Carroll County vs. Smith, 111 U. S. 556, 562.

In *Gelpcke vs. Dubuque*, 1 Wall. 206, it was said:

"We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own states. But there have been, heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immo-

late truth, justice and the law, because a state tribunal has erected the altar and decreed the sacrifice."

There is no constitutional or statutory requirement, that the federal tribunals must follow the adjudications of the state courts of last resort in any case. Such a rule would be hostile to the conception of an independent federal judiciary, to which non-resident litigants may resort to avoid local bias. The rule of harmony of decision was said in *Burgess vs. Seligman* to rest upon comity, good sense, and the desire to attain uniformity in the decisions of all the courts.

But the decisions of courts are not the law.

It was said in the case of *Swift vs. Tyson*, 16 Peters, 18:

"In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and not of themselves laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be defective, ill-founded or otherwise incorrect."

That such decisions are only evidence of the law, is the reason that only well-settled decisions of the state courts, and those in accordance with established precedent, are accepted and followed by this court.

If it is as evidence, not as law, that the federal courts regard the state decisions, then they are not bound to accept that evidence, or to be guided by it in any manner whatsoever, if they find it to be unworthy of belief, or false in its proof, or antagonized by a preponderance of contrary *evidence*. If such decisions are the law, the federal courts would be bound to follow them, though they might be conceived in fraud, local prejudice, and more often bias. And yet this court is no more bound to follow a state decision, the outcome of bad reasoning and bias, than it is to adopt one, the product of corruption.

It was said in *Burgess vs. Seligman* that the very purpose of conferring this jurisdiction upon the federal courts was to *institute independent tribunals*, for the protection of non-resident litigants against local prejudice; and if that laudable purpose is to be effectuated, then these independent tribunals must be given the power to correct local bias of the state judiciary by the refusal to follow their decisions.

It needs no argument to prove that if this position is not correct, the very object of vesting this jurisdiction in the federal courts would be defeated; and if the adjudications of the state courts are to be conclusive authority in this court, then the non-resident litigant may as well sue in the state courts, because their decisions finally would control the judgment in his case.

It is respectfully suggested that were Mitchell, admr., vs. Ry. Co. here upon writ of error, it would be reversed.

Were the case of *Mitchell, admr. vs. Ry. Co.*, in this court upon writ of error, the judgment would be reversed beyond all doubt, because it is badly reasoned in opinion, was a prejudged case and was decided against the plaintiff without allowing him his day in court.

In all cases brought here for review under the twenty-fifth section of the judiciary act, it is said that this court has never failed to determine for itself the construction of a state statute without reference to the previous adjudications of the state court upon the subject. Of what value would the appellate power of this court be to the aggrieved party if such were not the case? Cases are in the books, where this court upon writ of error from the state supreme court has pronounced invalid an act of the state legislature, and reversed the judgments of the supreme court of the state: *Jefferson vs. Skelley*, 1 Black 436. It is unquestionable, that cases may be *sent* here of such character that it is necessary to the proper attainment of justice that this court pursue the same course.

Identical questions may come here in both ways. "Under such circumstances it will hardly be insisted that state adjudications are to control in one case and not in the other. Our duty depends upon the questions involved, and not upon the channel through which the case comes before us."

Butz vs. Muscatine, 8 Wall. 575, 582.

The latest utterance of this court upon this general subject was recently made by Mr. Justice Gray in the case of *Folsom vs. Ninety-Six*, 159 U. S. 611. He said: —

"The general principles, which must govern the decision of this question, have been often affirmed by this court, and were stated by Mr. Justice Bradley, in delivering judgment, after great consideration, in the leading case of *Burgess vs. Seligman*, as follows:

'The federal courts have an independent jurisdiction in the administration of state laws, coordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two coordinate jurisdictions in the same territory is peculiar, and the results would be anamolous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established, which become rules of property and action in the state; and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence. So,

when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states, was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.' 107 U. S. 20, 33, 34."

In the *Burgess vs. Seligman* case an action was brought by plaintiff against defendants, as stockholders of a railroad corporation, under a statute of the state of Missouri, to recover a debt due to him by the corporation. When the case was under the consideration of the United States circuit court, no construction of the statute had been given by the state tribunals, contrary to that given by the circuit court. Subsequent to the determination of the case by the circuit court, and before its argument in the supreme court of the United States upon writ of error thereto, the supreme court of Missouri, in two cases involving the very transactions in the federal case, gave judgment adversely to the judgment of

the circuit court, and to the views expressed by the federal judge. The supreme court of the United States refused to consider itself bound to follow the decisions of the state court in this case.

Mr. Justice Bradley, at page 35, said:

"In the present case, as already observed, when the transactions in question took place, and when the decision of the circuit court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions, which the circuit court was called upon, and which we are now called upon to consider. It can hardly be contended that the federal court was to wait for the state courts to decide the merits of the controversy, and then simply register their decision; or that the judgment of the circuit court should be reversed merely because the state court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so; but in the exercise of that independent judgment, which it is our duty to apply to the case, we are forced to a different conclusion."

The case of *Mitchell, adm'r, vs. Ry. Co.* cannot be said in any sense to be a well settled decision of the Pennsylvania court, construing the will of James S. Stevenson. It is in direct conflict with a carefully decided case of this court (*Britton vs. Thornton*), involving the construction by this court of a will giving title to Pennsylvania real estate. *Britton vs. Thornton*, at the time it was decided, was not antagonistic to any Pennsylvania case upon the subject; it was in accordance with the principles of law, adopted by the Pennsylvania courts up to the time of its decision. No Pennsylvania case, until the decision of *Mitchell, adm'r, vs. Ry. Co.*, had held that the principles of *Britton vs. Thornton* were not the law in Pennsylania. The court of common pleas of Allegheny County decided that the principles, upon which the

Pennsylvania supreme court afterwards ruled this case, were not applicable to the langauge of the will and the facts of this case. The Pennsylvania supreme court reversed the reasoning of the lower court without affording counsel for plaintiff an opportunity to be heard in argument against the application of the rule, which was held to be decisive of this case. The United States circuit court doubted the wisdom of the decision of the Pennsylvania supreme court case. Certainly, in opposition to all this evidence of a contrary construction, it will not be said that this one decision is sufficient to warrant this court, against its own judgment, in holding that the construction of the will urged by the defendants is the correct one, or that it is so settled in Pennsylvania. It is not such a settled construction as to have become a rule of property.

In conclusion, it is urged that the construction of a will does not form such rule of property as does the settled construction of a statute. If the blemish upon the title is apparent, as it is in this will, the purchaser buys assuming the risk of his loss. If the title proves worthless he only must bear the burden of the loss. Rights or property interests of but few individuals are acquired or lost by virtue of the construction of one particular will. Generally, as in this case, those claiming under the will are merely volunteers. Each will is a law unto itself; and no will is absolute authority for the construction of another will. If the interpretation of one of its devises be one way or the other, it means the success or failure of those only, claiming ownership in the property devised. It is different in the case of state statutes, enacted by the legislature, providing *ex. gra.* for the issuance of bonds. If such statute be declared valid or invalid by the state courts, and respectively invalid or valid by the federal courts, a serious and often unjust complication of affairs must necessarily result. The purchasers of the bonds buy on the faith of the statute and of the decision of the court that it is valid. They are purchasers for value. The

resident holders of such bonds must succeed or fail as the state courts decide they are entitled to do; and the non-resident holders must inversely fail or succeed if the federal courts refuse to follow such decision of the state court. The result is, that one class of holders are secured and another class suffer loss. No such objection can be urged in the case of the construction of a will.

The following arguments are urged against the adoption by this court of the *decisive* construction of the will, made in *Mitchell, adm'r., vs. Ry. Co.*:

I. This court, in a well considered case, repudiated the principle of construction, applied to this will by the Pennsylvania court. *Britton vs. Thornton*, 112 U. S. 526, was constructive of a Pennsylvania will, in which language is found substantially the language of this will.

II. Plaintiffs in error were not allowed their "*day in court*" to be heard in answer to the principle of construction, applied by the Pennsylvania court.

III. *Mitchell, adm'r., vs. Ry. Co.* is unsound in its reasoning, and is against all authority upon the subject.

Let us consider these propositions in order:

I. This court, in a well considered case repudiated the principle of construction, applied to this will by the Pennsylvania Court. Britton vs. Thornton, 112 U. S. 526, was constructive of a Pennsylvania will, in which language is found substantially the language of this will.

Britton vs. Thornton, decided in 1884, construed a Pennsylvania will, involving title to Pennsylvania real estate. The devise was "to Eliza Ann Thornton, natural daughter of my said son Nelson, * * * * * * all that plantation, &c., she paying out of the rents to my executors the sum of three hundred and sixty-five dollars annually during the life of my said son Nelson, provided, that should the said Eliza Ann die in her minority, and without lawful issue then living, the land hereby devised

shall revert and become a part of the residue of my estate hereinafter disposed of."

This court held that said devise, though without words of inheritance, was in fee; this was apparent from the personal charge for the payment of money imposed upon Eliza Ann, from the devise over upon her death under age and without issue, and because the will was made since the act of 1833.

Mr. Justice Gray said:

"When a devise is made to one in fee, and 'in case of his death' to another in fee, the absurdity of speaking of the one event, which is sure to occur to all living, as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime: 2 *Jarman on Wills*, ch. 38; *Briggs vs. Shaw*, 9 Allen 516; *Lord Cairns in O'Mahoney vs. Burdett*, L. R. 7 H. L. 388, 395. But when the death of the first taker is coupled with other circumstances, which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator: *O'Mahoney vs. Burdett*, cited above; 2 *Jarman on Wills*, ch. 49.

We find nothing in this will to take the case out of the general rule, to support the argument of the plaintiff in error that the testator intended that the devise over should not take effect if Eliza Ann survived him, or at least if she survived his son William."

The decision of *Britton vs. Thornton* is consonant to the Pennsylvania decisions and accords with the best authorites. It is true that the courts have established the rule that where the primary devise is in *express fee simple* and the gift over upon death without children, or issue, the sub-

stitutionary construction is to be applied. This rule is established by precedent merely, and does not rest upon the reason of those cases, where the gift over is upon the *death* merely of the first taker; the rule applies only where the context is silent, and the tendency is to lay hold of slight circumstances in the will to vary the construction and effectuate the language according to its natural import:

Vanderzee vs. Slingerland, 103 N. Y. 47, 53;
3 *Jarman on Wills* (R. & T. ed. 1881) 640; 709;
Jessup vs. Smuck, 16 Pa. 327, 340;
Caldwell vs. Skilton, 13 Pa. 152, 155.

In this will the context is not silent. The testator directs that if Amanda die *unmarried* and *without offspring* the lots shall be *sold*.

In *Britton vs. Thornton* the language was if Eliza Ann die in her *minority* and *without lawful issue* then living, the gift over should become effective. In the one case death *unmarried* (and it must be remembered that *Jessup vs. Smuck*, supra, ruled that testator by using these words did not contemplate the devisee's death unmarried before his own death,) and in the other case, death *under age* were the terms used. For the purpose of determing the application of this construction these terms are identical. The lots were to be *sold* under certain contingencies. As a testator is always presumed to calculate on the provisions of his will taking effect, he therefore contemplated the sale to be made at some time after the happening of his own death. He is not to be considered as intending to provide exclusively for lapse, if the will admits of any other construction.

3 *Jarman on Wills* (R. & T. ed. 1881) 709.

The sale was to be *at* Amanda's death; and the sale, of course, was to be made *by* testator's executors; therefore, it is a false and unreasonable construction to read the time of Amanda's death as prior to testator's death.

If this court refused in *Burgess vs Seligman* to reverse the judgement of the United States circuit court, in order to conform to a subsequent construction of a statute made by a state court, then it may be asked with stronger reason, how can it overrule its decision in *Britton vs. Thornton*, a carefully considered case of ten years standing, in order to follow a doubtful construction of a will, made under the circumstances, which attended the determination of this case in the state court?

The answer to the question is found in the case of *Claiborne vs. Brooks*, 111 U. S. 410, where this court refused to apply the rule of conformity and to follow the case of Ross vs. Anderson, decided by the supreme court of Tennessee, in the construction of a statute of that state, for the reason that it was not *a well settled decision and construction of that statute.*

II. Plaintiffs in error were not allowed their "day in court," to be heard in answer to the principle of construction, applied by the Pennsylvania court.

Mitchell adm'r. v. Ry. Co. is not "*a well considered decision of the state court,*" which a court is justified in following. It is illogically reasoned, and the supreme court suppressed a full argument of the case.

Plaintiffs always contended that the devise to Amanda Stephens in the will of James S. Stevenson, vested in her a defeasible fee with an executory devise over to the Barber heirs, upon her death unmarried, or, if married, without offspring by her husband.

Defendants have maintained that a fee tail estate was devised to Amanda, which was properly barred by the statutory conveyance, made by her and her husband in 1848; and, if not a fee tail, then an absolute fee simple, upon her surviving the death of the testator, in which event the gift over to the Barber heirs was merely substitutionary in character, and could only be effectual if Amanda died, under the conditions named, previous to the death of testator.

Judge Ewing, as well he might do, made light of the latter proposition and disposed of it summarily in the following words:

"The circumstances, the age of the devisee, and the will leave us in no doubt that the contingency of Amanda's death, did not mean her death before the testator." (See page 8 hereof.)

With no attempt at argument, he held the devise to be a fee tail.

Appellant's printed brief upon appeal to the supreme court of Pennsylvania confined itself to an argument of the one question, which Judge Ewing had pronounced vital. Upon service of appellees' brief, we were surprised to find that they still urged both positions. It was too late to print a brief in reply; we were, however, supplied with an abundance of law, to answer the latter argument upon the oral presentation of the case. Counsel, in opening for appellants, argued only the points presented upon their printed brief, and having exhausted his allotment of time, *suggested* that the substitutionary construction, contended for by appellees, was not applicable to this case, if for no other reason, because of the great difference in age between testator and devisee, and distinctly announced that senior counsel for appellants would devote considerable time to the discussion of that phase of the case. The report of the case shows that counsel for appellees were "not heard." See 165 Pa. at page 648.

Chief Justice Sterrett's attempted answer to such suggestion hardly seems to be reasonable argument.

(See page 13 hereof.)

III. Mitchell, adm'r., vs. Ry. Co. is unsound in its reasoning, and is against all authority upon the subject.

Strange as it may seem, under such circumstances the supreme court of Pennsylvania, while it affirmed the judgment entered by Judge Ewing, squarely reversed the reason-

ing he adopted and ruled, according to appellant's contention, that a remote failure of issue was out of the question.

Let us examine the process by which the court reached that result.

The court held that although the devise to Amanda was made before the act of 1833 and without words of inheritance, yet when read in connection with the introductory clause of the will, a plain intent was manifested in the first instance to give her an absolute estate. This conclusion was followed by the declaration, that "there are no words used in the second paragraph of the will, containing the devise to Amanda, which indicate any intent to limit her estate."

Then follows the assertion that "had the will stopped there, the devise would unquestionably have been absolute;" but the will did not stop there; and so the arbitrary result is declared to be that "the following paragraph was not intended to operate by way of limitation, but was manifestly substitutionary in character." (See *supra* pp. 11 and 12.)

This judicial peregrination reached the desired result, but certainly inflicted violence upon the words of the will. The decision was reached regardless of authority; for it has been said:

"That a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary; and, accordingly, a provision for the death of devisees will not be considered as intended to provide exclusively for lapse, if it admits of any other construction."

3 *Jarman on Wills* (R. & T. ed. 1881) 709.

"The general rule is, that where the context is silent the words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well *after* as before the death of testator."

3 Jarman on Wills (R. & T. ed. 1881) 640;

Jessup vs. Smuck, 16 Pa. 327, 340;

Vanderzee vs. Slingerland, 103 N. Y. 47, 53.

In *Caldwell vs. Skilton*, 13 Pa. 152, 155, it was said:

"As a testator is not supposed to anticipate himself surviving the object of his bounty, this construction is only made from necessity, and gives way where the contingency of the death of the first beneficiaries may be referred to some other time."

In *Jessup vs. Smuck*, 16 Pa. 327, 340, it was said:

"This construction is only made *ex necessitate rei*, from the absence of any other period to which the words may be referred, as a testator is not supposed to contemplate the event of himself surviving the objects of his bounty. This rule, admitted to be artificial, is not of uniform application where other collateral events are connected with the death."

It was said by President Judge Learned, in a dissenting opinion, in the case of *Mead vs. Maben*, 60 Hun. 268, that

> "A testator looks forward to time and to events after his death. He does not usually contemplate events which may be previous thereto. If he does, he indicates this by specific language. When he says 'if any of my children shall die' he speaks of their death after his. If he were thinking of the death of a child prior to his own, he would say 'if any of my children shall die before me not leaving children.' And since the object of courts should be to carry into effect the intention of the testator, they would do this better by following the literal meaning rather than artificial rules."

The Court of Errors and Appeals afterwards reversed the judgment of the general term and adopted the views of the dissenting opinion. Said Justice Gray:

> "We agree with the learned justice, who dissented at the general term, in thinking that, in this case, the intention of the testator is better carried into effect by following the literal meaning of the language of his eighth clause rather than artificial rules of construction. Where the testator's intention is concealed and context

is silent, and circumstances are wanting to aid us, the application of such a general rule is proper enough and safe; but, where the courts can make out the testator's probable intention, and it can be carried into effect without violating any law or statute, no general rule may rise above it." 131 N. Y. 255, 261.

In *Beck vs. Ennis*, 54 Hun. 126, 128, Justice Dwight said of this rule:

> "A rule so willingly avoided and apparently as much honored in the breach as in the observance, must be a very artificial one, and founded largely upon authority rather than upon principle."

The scope of the application of this substitutionary construction by the Pennsylvania courts was thus expressed:

> "It avoids the fault of converting an *express* fee-simple into a life estate or an estate tail by implication. It avoids the fault of seeming to give a fee-tail or a life estate in personal property—both the realty and personalty being granted in the same words. It follows the rule that that construction ought to be favored, that makes an estate vest absolutely at the earliest possible period."
>
> *Fulton vs. Fulton*, 2 Grant 28;
> *Morrison vs. Truby*, 145 Pa. 540, 548.

The rule is thus stated in *Hawkins on Wills* 258:

"Where real or personal estate is given with *words of limitation* implying the absolute ownership, but there follow alternative gifts over in the event of the first taker dying with and without issue or children, which exhaust all contingencies, so that, if unrestrained in point of time, their combined effect is to reduce the interest of the first taker to a life estate only, a ground is presented for restricting the gifts over to the period of distribution, in order to avoid an inconsistency with the prior absolute gift.

Thus, if real estate be devised to A *and his heirs*, with a gift over upon the death of A leaving children, to his chil-

dren, and a gift over upon the death of A not leaving children, to B, the devises over may be restrained to the death of A before his estate falls into possession, whether the devise be immediate, or in remainder. * * * *

But, if the devise or bequest be to A *simpliciter*, without words implying an absolute interest, the ground for this construction fails, and the gifts over will, in general, be held to take effect whenever the respective events happen."

This "*artificial rule of construction*" was arbitrarily forced far beyond its legitimate limit by the supreme court of Pennsylvania, in 165 Pa. 645, by a mode of reasoning directly counter to approved authority.

Let us notice the reasons *seriatim:*

(*a*) In the first place, the introductory words of the will have never been read down into the *corpus* of the will, in connection with the special devise, in order to supply the want of words of inheritance, and thus pass the fee simple, where there is a gift over of the devise. A limitation over of the estate upon the death of the first taker has in every instance been held to be fatal to the application of such *presumptive* construction.

Miller vs. Lynn, 7 Pa. 443, 447;
Wood vs. Hills, 19 Pa. 513, 515; and
McCullough vs. Gilmore, 11 Pa. 370;

cited by the court in 165 Pa. 649, recognize that rule.

The preamble of the will has never been regarded as a safe means of reaching the testator's intention.

It was Chief Justice Tilgham who said:

> "These introductory words have been more or less regarded by different judges. I will not say that they are not to carry some weight in doubtful cases; but I am not disposed to allow them much consequence, where it is pretty clear from other parts of the will, that an estate less than a fee simple is intended, because I believe that in most cases the testator has a general in-

tent to dispose of his whole estate, whether he says so in the beginning of his will or not."

Willis vs. Bucher, 2 Binney 455, 463.

And again;—

"Although this argument is satisfactory, where a devise is made in general terms, without expressing any estate, yet it has no weight in cases where the estate of the devisee is plainly indicated; because the devisee has no right to claim a greater estate than the testator intended for him, and if he dislikes the conditions, he may refuse the devise."

Ibid at page 464.

Chief Justice Sterrett, therefore, misapplied a principle of construction, which merely creates a *presumption* that testator intended to give an absolute fee, for the purpose of neutralizing the plainly expressed purpose to give less than a fee simple. It is the first instance of *implication* overriding *expression.*

(*b*) In the next place, the court read the words, *unmarried* and *married*, out of the will and caused the devise to read "*in the event of her death without issue*" over to subsequent takers. (See supra, page 12.)

This *disencumbering the sentence of the unmarried condition* has never been resorted to when the question is, Is the substitutionary construction applicable? Though both in England and Pennsylvania such method has been resorted to in some cases (with considerable objection from the judges though), when the fee tail construction had been applied.

Truthful contradiction of this statement is invited. The case of *O'Mahoney vs. Burdett*, L. R. 7 H. L. 388 (followed by this court in 112 U. S. 526) declared the rule in this respect to be:—

There is no authority that the words introducing a gift over in the case of the "death unmarried or without children" of a previous taker, do not indicate, according to their natural meaning, death unmarried or without children at any time, or that the ordinary and literal meaning of the words used is to be departed from, otherwise than in consequence of a context which renders a different meaning necessary or proper.

(*c*) In the third place, the gratuitous assertion was made by Chief Justice Sterrett that "as between the other two periods (*i. e.* testator's death and period of a definite failure of issue), it is scarce within the range of probability that testators hould have intended sale after a long life." (See supra, page 13.)

This weak argument is also well answered in the case of *O'Mahoney vs. Burdett, supra*, where the bequest of money was to testatrix's sister A, for life, and after her death to A's daughter B. "If my said niece should die unmarried or without children", the bequest was "to revert" to C. A died; then testatrix died; and afterwards B. died without children. It was contended that the expression "*if my niece should die unmarried or without children*," was to be understood as meaning the death of the niece unmarried or without children, not at any time whatsoever, but only during the lifetime of the tenant for life.

Lord Cairns, L. C., Lord Hatherly and Lord Selborne, unanimously held:

That the bequest was an absolute gift to B, defeasible by an executory gift over the event of dying, at any time, unmarried or without children, according to the ordinary and literal meaning of the words; and *there is no rule of construction arising from possible delay in vesting of a gift, which controls the natural meaning of the terms of the bequest.*

(*d*) In the fourth place, the court committed error, when it said: "The suggestion that because of Amanda Stephens' extreme youth, testator could not have had in contemplation the contingency of her marriage and death without issue in his life time, is without merit. No presumption could arise from the fact of making a will that testator expected to die before she should attain a marriageable age." (See supra, page 13.)

Well considered cases have decided that precise point otherwise.

In *N. Y., L. & W. R. R. case*, 105 N. Y. 89, 96, it was said:

> "The daughter was an infant of about six years of age at the time of the death of the testatrix, and it would be a very forced construction of the language of the will, to hold that the testatrix had an unexpressed intention, that if the child should die the next year, or at any other time, after the death of the testatrix, the devise over to her husband, sister and brothers should not take effect."

Washbon vs. Cope, 67 Hun. 272, was a bequest of money to a daughter, and in the event of her death without children, her portion should go over to testator's sons *nominatim;* at the date of the will, testator was seventy-seven and the daughter was forty-four years old, had been married ten years and was still childless. *Held*, that the words of the contingency did not refer to a death in the life time of the testator.

The same thought has been expressed in a much cited Pennsylvania case.

Thus, where the primary devise to Samuel was to him "and to his heirs and assigns"; *habendem* "to him and to his heirs and assigns forever," subject to the payment of a sum of money therefor, and there was a limitation over "*in case*

my son Samuel dies before he marries," the supreme court said:

"If the testator be considered as holding out an inducement to his son Samuel to marry, by making the estate devised to him absolute on marriage, it must be intended as referring to a marriage not during the short time of testator's nearly spent life, but to a time after his death, when Samuel became acquainted with the devise to him of the mansion farm in fee, but with a limitation over to his brother Joel and his heirs in case Samuel should die before he marries."

Jessup vs. Smuck, 16 Pa. 327 341

In their labored defence of the judgment in the case of *Mitchell, admr., vs. Ry. Co.* the defendants rely on the following Pennsylvania cases:

Caldwell vs. Skilton, 13 Pa. 152;
Biddle's Estate, 28 Pa. 50.
Schoonmaker vs. Stockton, 37 Pa. 461;
Fahrney vs. Holsinger, 65 Pa. 388;
Mickley's Appeal, 92 Pa. 514;
Stevenson vs. Fox, 125 Pa. 568;
King vs. Frick, 135 Pa. 575;
Morrison vs. Truby, 145 Pa. 540; and
Cole vs. Ayres, 156 Pa. 197.

It will be found that none of them are authority to vindicate that judgment, and that the decision of them was put upon entirely different grounds than it is possible to apply in this case.

In *Caldwell vs. Skilton*, 13 Pa. 152, the devise was to testator's children, *nominatim*, and *their heirs and assigns forever, to have and to hold, share and share alike, as tenants in common;* and in case of the death of either of my children, his or her share or purpart to descend to the children of said child; or if said child should die without issue

born alive, then the said share to be divided among and enjoyed by surviving children, their heirs and assigns forever, share and share alike, as tenants in common. *Held*, that each child on the death of the testator took an indefeasible estate in fee simple; that by the clause, "in case of the death of either of my said children," death generally, or whenever it might happen, was not meant, but that the fee should vest absolutely on *testator's* death, and that it was not defeasible throughout the entire life of the children.

Said Justice Bell:

"It is very obvious, it was not intended to cut down the absolute fee given to them, in every event, and yet such must be the result, if the testator meant the indefinite death of any of his children, contended for by the defendant as marking the period of transmission. Under that reading, if the first takers died leaving children, the estate would go over to the latter, in fee, as purchasers, and if the former died, indefinitely, without children, it would go to the surviving brothers and sisters absolutely.

The practical effect would be to reduce the first estate to an interest for life, merely, notwithstanding the explicit use of technical terms conferring a fee, evidently employed with a distinct notion of their legal meaning: *Clayton vs. Lowe*, 5 Barn. & Ald. 636. Besides, that construction would render defeasible the original shares first taken under the will, while those which might accrue by the clause of survivorship, would vest absolutely; a consequence, certainly, never contemplated: *Pain vs. Benson*, Atk. 80; *Ex parte West*, 1 Bro. C. C. 575.

Congruity, therefore, requires that the chance of survivorship among the children of the testator, and the possible event upon which the limitation over to *their* children might take effect, should be referred to the same determinate period."

Jessup vs. Smuck, 16 Pa. 327 at page 340, said that *Caldwell vs. Skilton* was so decided "to avoid the incongruity which must result from any other construction. * * * * The case was a tenancy in common to the first takers with survivorship, a circumstance that had its influence upon the opinion of the court."

Biddle's Estate, 28 Pa. 59, did not involve a question of title to real estate. The case was upon distribution of a balance in the hands of executors; this balance arose from "*personal property, money loaned, stocks and securities, and the interest and dividends thereon.*"

The gift was "to my daughter everything of which I die possessed," with a bequest over "in the event of my daughter's death without children." *Held*, that the gift to the daughter was absolute. The fact that the daughter was the heir at law of the mother, and the principal object of her bounty inclined the court in her favor in the interpretation of the will.

Where, in a will, which clearly contemplated a complete distribution of the whole of testator's real and personal estate among his children, real estate was given to one, charged with certain payments; it was *held* that the devisee took a fee simple, although no words of inheritance were used, and the will provided that if any devisee should die unmarried or without issue, his or her share should revert to the testator's general estate.

The court said:

"The testator intended to make by his will a *distribution* of his real and personal *estate* among his children, and so he expresses himself. He makes the division equal, and if he had failed to create more than life estates, each would have been equal heirs to the reversions; that is, each would have a life estate by the will, and the reversion by descent, which together would be the fee of the whole. This was not

the intention. A complete *distribution* of the whole *estate* was intended. * * * Some of the shares are payable in money, and certainly no life estate was intended as to them; and if not to them, then to none."

Schoonmaker vs. Stockton, 37 Pa. 461.

In *Fahrney vs. Helsinger*, 65 Pa. 388, it was said, "there can be no question that the devise of the balance of the mansion farm to Daniel and Susanna, vested in them an estate in fee simple: 'unless it appears by a devise over or by words of limitation or otherwise in the will that the testator intended to devise a less estate.' Such is the provision of the ninth section of the Act of April 8th, 1833, P. L. 250. Even, however, without the aid of that provision, the express charge of a sum in gross to be paid by the devisees, as here the rate of fifty-five dollars an acre, makes it a fee without other words."

It was held that Susanna having survived the testator took an absolute estate and the gift over, if she die without heirs failed.

The reasons for the determination of the case were thus expressed by Justice Sharswood:

"When a testator indicates, as this one has most unmistakably, that all his children shall take what he leaves, share and share alike, it is the duty of the court, in a case of doubt, to put such a construction on the will as will not disappoint this, the primary and paramount purpose. * * * *

We are driven to adopt the third construction contended for * * * * This satisfies all the words of the codicil, and is consistent with the whole scheme of the will."

Mickley's Appeal, 92 Pa. 514 was a similar case arising upon a bequest of personalty. Here testator bequeathed one-sixth of his estate (it having been converted into personalty) to a son, "*or his heirs*," and a like proportion in

the same language to two other sons, and the remaining three-sixths in trust for each of his three daughters. He then directed "that if either of my sons die without leaving issue living at the time of his death, the share given to such son" to go over to testator's other children or their issue.

Held, that each son had an absolute, indefeasible interest in the share bequeathed to him. Justice Sharswood said:

"According to the construction contended for, the original share of the son would be held subject to the executory bequest over, the accrued share would be held absolutely, while the accrued shares of the daughters would be held exactly as the original shares. Such a result was referred to and relied on as evidence that it was not the intention of the testator in *Caldwell vs. Skillon*."

In *Stevenson vs. Fox*, 125 Pa. 568 and in *King vs. Frick*, 135 Pa. 575, the devise in both instances was to testator's son and "*to his heirs and assigns forever*," with a devise over, if he should die without lawful issue, and both cases were decided upon the authority of *Mickley's Appeal*.

In *Morrison vs. Truby*, 145 Pa. 540, the devise was to a daughter "*and her heirs*," with a bequest of personalty, and if "she shall die without leaving lawful issue living at the time of her death," then, in that event, over to her brother in fee simple; the gift over, applied both to real estate and personalty.

Held, that the testator meant death prior to his own death. Said Justice Clark, at page 546:

"The writer of the will had a full knowledge of the legal meaning of the words employed, and it is extremely improbable that, after conferring a fee in strictly accurate technical terms, he meant to strike it down and reduce it to a life estate merely."

And at page 547:

"We cannot believe that the testator intended the same words, applied generally to both classes of property, to have a particular effect with respect to one class and an entirely different effect with respect to the other; for, having blended them in this particular clause of the will, the undoubted inference is, that he intended this clause to be subject to the same construction as to both."

In *Coles vs. Ayres*, 156 Pa. 197, the testator gave the *residue* of his estate to his children in equal shares, describing no estate; and "if both of my children should die intestate and without lawful heirs," then over. *Held*, that the Act of 1833 passed a fee simple; that "die intestate" was a clear recognition of a fee simple; and that the gift over was substitutionary in character and designed to prevent a lapse.

An examination of the foregoing cases discloses the fact that, in some of them the primary devise was given in fee simple in accurate technical terms, and it was held that the gift over could not reduce that *express* estate, when the words of inheritance were employed with a *distinct notion of their legal meaning;* in another class of cases the testator had blended real and personal estate in one clause of his will, with a gift over upon death without issue, and it was held that an absolute estate in both realty and personalty must be given, because the intention was to give the same estate in each, and a fee tail in personality cannot be given; and in the last class of cases the will clearly showed that a complete and equal distribution of the testator's whole estate was intended; and it was held that this purpose could not be accomplished, if death without issue were read as death at any time, because that construction would render defeasible the shares originally taken under the will, while the shares accruing by survivorship would vest absolutely, which would be squarely contradictory of the expressed intention to accomplish an equal distribution. Such cases are the defendants' authorities.

We have but to recapitulate the above authorities in this manner, in order to demonstrate how valueless they are as precedents for this case. This devise contains no words of inheritance; there is no expression that Amanda shall take a fee-simple; the will took effect prior to the Act of 1833, therefore there is no statutory presumption of a fee-simple as there was in *Britton vs. Thornton*; the gift over to the Barber heirs was only of the lots devised to Amanda and *not* also of her share of the personalty; and, of course, there is no intention in this will to make a complete and equal distribution of testator's whole estate.

The reasons which move courts to apply the substitutionary construction were clearly expressed in a leading New York case, substantially as follows:

In the first class of cases where the devise in fee simple or the absolute bequest is followed by a gift over *in case of death only.* Here as the *event* of death is most certain, but the time only of its happening is uncertain, the words of contingency can be satisfied only by referring them to death before a particular period, which is necessarily before the testator's death.

This construction stands in most cases, however, upon the probable intention of the testator to prevent the disinheritance of a testator's posterity. This would often happen if a death of the primary legatee at any time, was held to be within the meaning of the devise. Where the will is dictated under the influence of family relations, it would seldom happen that a testator would intentionally cut off the issue of a son or daughter from taking the parent's share in his estate for the benefit of collateral objects.

A second class of cases is where there is an alternative limitation dependent upon the death of the first taker, as a gift to A, and in case of his death without issue, then to B; this is held to refer to death in testator's lifetime. This rule is established by precedent merely, and does not rest upon

the reason of those cases in the first class. It is manifest that event on which the gift over is to take effect is distinctly the pointed out, and is uncertain and contingent, viz: death without issue, and it is not necessary, in order to give effect to the words of the contingency, to refer the death to one happening before the death of the testator.

So such a construction is not necessary to prevent the disinheritance of the issue, for it is only in the event that there is no issue that the gift over is to operate. This rule, "*established by the courts*," applies only where the context is silent, and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death, or of death without issue, or other specific event. The tendency is to lay hold of slight circumstances in the will to vary the construction and give effect to the language according to its natural import.

Vanderzee vs. Slingerland, 103 N. Y. 47, 53.

Mitchell, admr., vs. Ry. Co. can not control on the doctrine of *res adjudicata*, even though the suit be between substantially the same parties for the same land in controversy, because by statute in Pennsylvania the judgment in the first ejectment is not a bar to a second action of ejectment.

In *Gibson vs. Lyon*, 115 U. S. 439, 445, Mr. Justice Matthews said:

"It is urged by counsel for defendants in error, that the judgment of the supreme court of Pennsylvania in the ejectment in favor of the defendants against the immediate grantors of the present plaintiff below, referred to in the eighth finding of fact, if not entitled to the force of an estoppel as *res adjudicata*, is at least an authoritative decision of the highest court of the state upon the law of the case, which, as it involves only questions of title to real estate within its territory dependent on its local jurisprudence, ought to furnish the obligatory rule of decision for the courts of the United States.

The former judgment in ejectment is not a bar to the present action, according to the law of Pennsylvania, where the subject is regulated by statute. * * * *

As a precedent, the decision of the supreme court of the state though single, is entitled to peculiar respect, because all the questions decided arise upon the local law of the state; but it can not have conclusive force in the courts of the United States, unless it has become a rule of property.

The plaintiff in error, being a citizen of New Jersey, had a constitutional right, by virtue of that fact, to invoke the jurisdiction of the courts of the United States, and is entitled to their judgment upon his rights under the laws of Pennsylvania."

We have in this suit the following facts which were not in the Pennsylvania case, viz:

"That on the 16th day of October, 1831, when confined to his room by sickness, and after a dangerous illness for two weeks preceding his death, the testator, though he had theretofore signed his will, first published the same in the presence of witnesses whom he called to attest it, and a few hours thereafter died."

(See paragraph 2 of certificate, at page 6, hereof.)

Had these facts been part of that case the court intimates that its judgment *might* have been different; for in speaking of the testator's intention Justice Sterrett said:

"So far as appears from the record, he may have had an expectation of long life." (See page 13 hereof.)

There can be no question that the above facts have great relevancy to the proper construction of the language used in the will.

This was the first publication of the will and the instrument speaks from that date.

The rule is thus stated to be :

"The effect of a new publication is, that all which the words embrace at the time, when the new publication is made, shall pass thereby; or, to put it more clearly, when a man republishes his will, the effect is, that the terms and words of the will shall be construed to speak with regard to the property the testator is seized of, and the persons named therein, at the date of the republication, just the same as if he had such additional property, or such persons being in *esse*, at the time of making his will; the conclusion from the fact being, that the testator so intended."

Gilmor's Estate, 154 Pa. 523, 527.

A court of construction is not bound to shut its eyes to the state of facts under which the will was made; on the contrary, an investigation of such facts often materially aids in elucidating the scheme of disposition, which occupied the mind of the testator. To this end, it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret.

1 Jarman on Wills (R. and T. ed. 1881) 733;

Swift vs. Duffield, 5 S. and R. 39;

Wells vs. Ritter, 3 Wh. 326.

Defendants in the court below urged that the will, having been dated on March 12, 1831, and not published by testator until October 16, 1831, while confined to his room after a dangerous illness of two weeks, is not to be construed in the light of the facts surrounding its publication. We are not discussing the validity of the probate of the will, as that argument implies; it would have been a good will and admissible to probate had it never been published in the presence of witnesses. These additional facts are relevant to the proper construction of the will in this : they demonstrate unquestionably that testator never contemplated the interpretation of his will which the Pennsylvania court

thrust upon him. Had he meant, on the date of the will, to provide for a lapse in the case of Amanda's death before his own, he would have stricken out the words at the publication of his will, a few hours previous to his death, because, with death impending, he then knew they were meaningless surplusage. The fact that he *then* permitted them to remain in the will, carries conviction that his meaning always had been that the gift over to the Barber heirs should be effective at whatever time Amanda's death might occur. It is worth while also to bear in mind that of the five devises in the will, the one to Amanda is the only one to which a gift over is annexed. It is peculiar, that her devise should be the only one of the five against whose lapse he might desire to provide; and likewise peculiar, that the Barber heirs, who were, elsewhere in his will, objects of considerable of his bounty, should be dependent merely upon the lapse of a devise in order to reap a benefit therefrom. It is a violent and unreasonable construction of the will, to say that the devise over was to take effect only in the event of Amanda's death, unmarried, or if married without offspring by her husband, before the death of the testator, when we reflect upon the fact that Amanda then had but attained the tender age of five years and was innocent of adult thoughts of marriage and the bearing of children.

We avoid such a monstrous interpretation, make the devise over dependent upon no ridiculous contingency, and impute a sensible meaning to the words of a sensible man, by reading the death of Amanda as intended to occur at any time, whether before or after the testator's death.

To recapitulate:

It is submitted that the decision of the supreme court of Pennsylvania, construing this will, is not conclusive upon this court, because the mere construction of a will by a state court does not constitute a rule of decision for the federal court. That decision can not control, either as *res*

adjudicata, or as such an authoritative decision of that court upon a question of title to real estate, which should furnish the obligatory rule of decision for this court, because the former judgment in ejectment is not a bar to the present action under the Pennsylvania statute. The decision of the supreme court of Pennsylvania has not become by acquiescense a rule of property in the state. It is probable that the decision would be reversed if the case were again submitted to the state court; and there would be a repetition of that court reversing itself in this case, as it reversed *MacConnell vs. Lindsay*, 131 Pa. 476, within three years by the case of *MacConnell vs. Wright*, 150 Pa. 275. The supreme court of Pennsylvania decided this case without affording plaintiffs in error an opportunity to be heard in answer to the interpretation given by it to this will; and this, too, in view of the fact that the court of common pleas of Allegheny County had held that such interpretation was devoid of meritorious consideration. The decision is antagonized by all approved authorities of Pennsylvania and England, and is inapplicable because of the facts of the case. That decision held that a *constructive* fee, conferred by the primary devise, and an *express* limitation over to secondary devisees, created an inconsistency, which must be reconciled in the usual way by allowing the prior absolute gift to prevail. As the prior gift could not by any possibility be regarded as *absolute*, the premises were mistaken and the conclusion must fall. This court in *Britton vs. Thornton* repudiated the application of this substitutionary construction, to prevent a lapse where the will presented a fee, presumed from the act of 1833, and from the personal charge of a payment of money imposed upon the primary devisee.

The facts set forth in the second paragraph of the certificate (see page 6 hereof) render the decision of the supreme court of Pennsylvania inapplicable to the determination of this case.

What estate did Amanda Stephens take under the devise?

The primary portion of the devise was to Amanda Stephens, "*daughter of Margaret Stephens,*" of the lots in question. "*Said Amanda Stephens is now five years old, (born April 7, 1826.) Stephens and his wife, the parents of Amanda's mother, live near Connellsville, in Fayette County, Pennsylvania.*"

This description of Amanda is strong evidence that she was base born, because her surname, that of her mother and that of her maternal grandparents were the same. She must have been the daughter of Stevenson, because the testator would hardly provide for somebody's else illegal child.

It is respectfully suggested that at the trial of this case plaintiffs offered evidence to prove the common report during her childhood that Amanda was testator's illegal daughter. The records of the Orphans' Court were offered in evidence to show that the petition for the appointment of her guardian described her as Amanda *Stephens;* that the final statement of the guardian's account described her as Amanda *Stevenson;* and that in the settlement with her guardian, after her marriage, she executed a release or acquittance to him as "*Amanda Haight, formerly Amanda Stevenson.*"

At the time of testator's death she was known as *Amanda Stephens;* after attaining the age of twenty-one (we know not how long before that) she was known as *Amanda Stevenson;* and she herself recognized the fact that the latter name had been given to her by releasing to her guardian as *Amanda Haight, formerly Amanda Stevenson.* In the face of all this evidence it cannot be gainsaid that she was the illegal daughter of testator.

The case of *Goodright vs. Saul,* 4 Term Rep. 356, held that the taking by the son of the name of the person with whom his mother was living at the time of his birth, which had been retained by him and his descendants ever since,

was a very forcible circumstance to show that the son was an illegitimate.

It was contended that general reputation, coupled with the facts proven by these records and the theory readily deducible from the will, was abundantly sufficient to prove the fact that Amanda was the illegal daughter of the testator. This was held to be sufficient evidence of illegitimacy in the case of *Goodright vs. Moss*, Cowp. 591. The circuit court refused to find such fact from the evidence and upon writ of error to the court of appeals such refusal so to find was assigned for error.

In Pennsylvania, until the act of 27 April, 1855, a bastard was *filius nullius;* that act declared that such child should take and be known by the name of his mother, and each should have the capacity to take and inherit from each other real and personal estate. This was the first enactment changing his common law condition: *Opdyke's Appeal*, 49 Pa. 373, 378.

This digression must be pardoned. Plaintiffs confidently urge that this fact of illegitimacy and this condition of the law when this will was made and took effect, afford some evidence of what the testator's intention respecting the devise to Amanda must have been.

The testator under such circumstance must be presumed to have contemplated the possible results of his devise to Amanda, whether we term it in law, a fee simple, a fee tail or a defeasible fee.

Because of her parentage and extreme youth, testator assuredly did not intend her to take a fee simple; if she took such fee, then from the time of his death until her attaining the age of majority, there was a lapse of sixteen years, during which, upon her death unmarried, the title to the lots would have escheated to the Commonwealth of Pennsylvania. Had she remained unmarried throughout the remainder of her life, and died intestate, the same result would

have ensued; had she so desired, after attaining full age, she might have devised the lots to whomsoever she pleased; had she died intestate, leaving a husband, but no issue, he would have become seized of the fee simple title to the lots, in preference to an escheat to the Commonwealth of Pennsylvania.

But the testator's will provided expressly against these results, because it explicity says that upon Amanda's death *unmarried*, the lots shall be sold and the proceeds divided amongst the Barber heirs; and upon her death *married* without offspring by her husband, the same disposition of them was to be made. This is unequivocal evidence that a fee simple title was not intended to be given to Amanda.

There is no greater evidence in the will of an intention to devise to her an estate tail. Up to the time of her marriage her estate was a conditional one; had the testator made no further provision for the estate going over upon her death without offspring, her conditional estate would have become absolute by her marriage; and the marriage would have defeated the executory devise over: *Jessup vs. Smuck*, 16 Pa. 327, 341.

Upon her marriage, if at all, the fee tail estate could first arise. This she could bar by the proper conveyance, which was done upon the supposition that she had a fee tail. The result would have been, that upon death without children or issue, and husband surviving, he would have been seized in fee simple; upon death intestate without husband, the estate would have escheated to the Commonwealth; or she might have devised the lots to whomsoever she pleased. But the testator directed that upon death, *if married, without offspring by her husband*, the lots, when sold, should go over to the Barber heirs.

The intention is clear to cut off the husband and provide for the issue, should the issue survive her. But was the failure of issue to be definite or indefinite?

Had Amanda died unmarried, the executory devise over to the Barber heirs would have become good upon a definite event and at a definite time: *Jessup vs. Smuck*, supra.

Such being the undoubted truth, it would be an unreasonable and forced construction, not to hold that the executory devise upon her death without offspring by her husband was at a definite period of time, and therefore upon a definite failure of issue: *Johnson vs. Johnson*, 8 Ex. 81. Consistency requires that the executory devise over in either event should be held to be good and effective upon a definite failure of issue and at the same time.

The plaintiff's have contended in the light of her apparent parentage and under the language of the will, that the testator's intention was that *Amanda should become the root of a new stock, which should have inheritable blood. If such stock should survive, her title to the lots would become absolute; if there was a failure of such stock at any time, the lots were given over to the heirs of John Barber. Such failure having occurred the executory devise to the Barber heirs became good and operative.*

Such construction harmonizes all the provisions of the will, accomplishes the testator's apparent intention, and is in strict accord with the language of the will and the facts of the case.

Amanda, therefore, took a constructive estate in fee with a good executory devise over to the Barber heirs, upon her death without leaving offspring by her husband. That the devise to Amanda was of a fee is apparent from the devise over upon death unmarried, or, if married, death without offspring by her husband, thereby implying that her estate would not be terminated by her death leaving offspring by her husband; and from the evident intention of testator to dispose of all his property at the time of his death.

Supposing that *offspring* in the will means *issue*, we have the following very capable explanation of the differ-

ence between the *legal* and the *vulgar* sense of the expression "die without issue." This explanation is in accordance with the Pennsylvania decisions upon the subject.

In *Booker vs. Booker*, 5 Humph. 504, 508, it was said:

"To constitute a valid executory devise, the contingency, upon which it is to take effect, must occur within a life or lives in being and twenty-one years and a fraction of a year afterwards. If then it is limited to take effect upon the failure of issue, that failure must be definite, and certain to happen within the period above mentioned. For if the limitation be upon an indefinite failure of issue—that is, upon the extinction of the whole line of descendants—it is too remote, as tending to the creation of perpetuities, and is therefore void, and the property vests absolutely in the first taker. It becomes, therefore, a matter of the greatest importance whenever these words, 'dying without issue,' are used, to understand what they mean, whether they mean a dying without issue living at the death of the first taker, or whether they mean a general or indefinite failure of issue.

* * * * *

The question, therefore, as to the meaning of these words in the will, is a question of intention; and although an artificial legal sense has been fixed to the words 'dying without issue,' so that taken alone they mean an indefinite failure of issue; yet any clause or circumstance in a will which indicates or implies such intention, will confine the sense to a dying without issue then living. Thus controlled, these words have their vulgar meaning; but otherwise, they are to be understood in their legal sense."

Chief Justice Wilmot thus speaks with respect to the absurdity of imputing an indefinite failure of issue to the words die without issue, &c.:

"I speak now, and mean to be understood as speaking, abstractedly from all the cases and legal exposition of these

words, 'if she die without issue,' that is, if she has no issue at the time of her death; if she leave no issue at the time of her death; not 'if she leave issue, and that issue fail two hundred years hence. Whenever that issue fails, the daughter will then become dead without issue, but she did not die without issue; for, 'dying' denotes that '*punctum temporis*' when the breath departs out of the body.

Such an exposition of these words as is contended for produces this monstrous absurdity;—it makes dying 'with issue' and dying 'without issue, to mean directly the same thing; they will have exactly the same operation; for if she die with issue, the bequest over is not to take place; and if she dies without issue, it is not to take place.

It is a shameful abuse of language to say, that dying without issue on this day, the 1st of February, 1768, and being dead without issue upon the 1st of February, 1900, mean one and the same thing. It is repealing that great law of all language, the grammar, and confounding present and future time together. It is the most intolerable tyranny, the grossest barbarism, to say they mark one idea, when the man who uses them, and all who read and hear them, are convinced they mark another. P. 308. * * * * * The truth is, these words are condemned by the law to be surly, rigid, inflexible and immovable, when they are alone; but if they can once be got into sensible company, they lose their gloomy, dogmatical, arbitrary disposition, and both speak and act as the rest of the company do." P. 321.

Keily vs. Fowler, Wilmot's Notes of Opinions and Judgments 298.

In *Hall vs. Chaffee*, 14 N. H. 215, 229, Chief Justice Parker said:

"Several of the cases recognize the expression, 'dying without issue,' as having two senses, first a 'vulgar sense,' by which is not intended an ungrammatical or unauthorized sense, but a common or popular sense, as contrasted with the

second, which is a legal or technical sense: 1 P. Wms. 432, *Target vs. Gaunt;* 10 Mod. 402, S. C.; 1 P. Wms. 666, *Forth vs. Chapman;* see also 1 P. Wms. 199, *Nichols vs. Hooper;* ditto, 565, *Pinbury vs. Elkin;* 3 P. Wms. 261. That this technical sense makes an unnatural and forced construction is exceedingly clear.

If any one die leaving issue, with what propriety can he be said to die without issue? If the expression were, 'if he shall die without property,' or 'die leaving no real estate,' the meaning would be plain. That a different signification is possible, where the negation is applied to issue, or heirs, by no means shows that such possible construction is a just one."

It is said in *2 Powell on Devises 583*, that "where the preceding devise is sufficient to give a fee, the convenience is all on the side of the restricted construction, which renders that fee defeasible on his not leaving issue at his death, and takes the estate out of the power of the first taker, who might, if he were tenant in tail (as he would be if the words were construed to mean an indefinite failure of issue), defeat the estate over by suffering a common recovery. To prevent this consequence the courts have generally lent a willing ear in favor of the restricted, and which we have seen to be, the popular construction of these words."

Issue is either a word of purchase or of limitation, as will best effectuate the testator's intention.

Smith's Executory Interests, sec. 507, page 249;

Findlay vs. Riddle, 3 Binney 139, 150.

Justice Sharswood said that the word *issue* only creates an estate tail, when it appears that the intent of the testator was, that it should have that construction; it does not *ex vi termini* create such estate. "It is a position not open to dispute that if it appears, either by expression or by clear implication, that by the word 'issue' the testator meant 'children,' or issue living at a particular period, as at the death

of the first taker, and not the whole line of succession, it must necessarily be construed to be a word of purchase."

Taylor vs. Taylor, 63 Pa. 481, 484;

Eby vs. Eby, 5 Pa. 461, 463;

Middleswarth vs. Blackmore, 74 Pa. 414, 419.

"Both in England and in this country courts have anxiously seized upon any expression or circumstance in the will, which would limit the generality of the expression *dying without issue*, or *without leaving issue*, or *for want of issue*, and confine it to issue living at the death of the first taker," said Chief Justice Savage in

Patterson vs. Ellis, 11 Wendell 259, 292.

In Pennsylvania "the courts have seized with avidity on any circumstance, however trival, denoting an intent" to fix the failure of issue at such period.

Seibert vs. Butz, 9 Watts 490, 494;
Miller's Estate, 145 Pa. 561, 565.

The English courts early gave full effect to this rule.

In *Pells vs. Brown*, Cro. Jac. 590, ("the *magna charta* on this branch of the law," said Lord Kenyon,) a devise to Thomas, and his heirs forever, and if Thomas die without issue, *living William* then over to William, was held to be a devise in fee, and not in tail to Thomas, because the words "living William," were sufficient to make the limitation over an executory devise.

This case is law in Pennsylvania:

3 Yea. 221; 7 W. & S. 98.

In *Porter vs. Bradley*, 3 Term Rep. 143, a devise to a son, Philip Dobin, in fee simple, and in case he shall happen "*to die leaving no issue behind him*," then over to another

son in fee simple, was held to be a fee simple in the prior devisee, and he having died without having issue living at the time of his death, the further disposition was a good executory devise.

This case is law in Pennsylvania:
24 Pa. 172; 57 Pa. 387; 155 Pa. 634.

Both of these cases, and also another leading English case of *Roe vs. Jeffery*, 7 Term Rep. 589, have been followed by the United States Supreme Court in the case of

Abbott vs. Essex Co., 18 How. 202.

Such being the rules regarding the absurd result, attained by the application of the *legal* sense to the words "dying without issue," and the inclination which courts have, and the slight circumstances which they lay hold of, to avoid using such legal sense, it is urged that there is abundant evidence in the Stevenson will to show, that the words "dying without offspring by her husband" should have their vulgar meaning, and that the application of their *legal* sense, if they have any, serves to defeat the testator's intention.

It is by no means certain that testator meant to use the word *offspring* in the indefinite legal sense of *issue*. *Allen vs. Markle*, 36 Pa. 117 so defined it, because the testator therein used the words interchangeably. Assuming the fact that Amanda was testator's illegal daughter, there is strong reason to say that he desired *offspring by her husband* to mean *legitimate children*. Why he did not use the latter words, his natural delicacy in publishing his own and Amanda's disgrace may have been the reason. The word is constantly used in the sense of children. Webster's dictionary defines it as "*especially a child or children.*" While it is reasonable, it is by no means essential to plaintiff's case, that it should be of itself so defined. We may admit that it means *issue*, and that, like the word, *issue*, if there be nothing to re-

strict its general sense, it has an indefinite meaning of descendants *ad infinitum*. Defendants in their argument adopt a very mechanical mode of reasoning, by saying that *offspring* means issue; *by her husband* means legitmate; and *unmarried* and *married* mean nothing. By successive substitution and substraction they finally mould the devise in shape satisfactory to themselves, and read it *in the event of Amanda dying without legitimate issue then over*, and they then declare that we thus have the ordinary case of a limitation over after an indefinite failure of issue, void as an executory devise; good as a vested remainder, subject to be barred as an estate tail by our statutory procedure, which has been done in this case. This mode of interpretatian is not seeking the testator's intention from the four corners of the will by giving every word a legitimate and reasonable meaning. It is seeking rather to defeat the testator's intention by invoking the application of purely technical rules, regardless of whether or not the will warrants their application. The burden to prove that testator meant to devise a gift over upon a definite failure of issue or offspring is not upon the plaintiffs, because the word *issue* only creates an estate tail, when it appears that the intent of the testator was that it should have that construction; it does not *ex vi termini* create such estate: *Taylor vs. Taylor*, 63 Pa. 481,484 (per Justice Sharswood.) Such being the rule, and so many *indicia* being present in this will to show such to be the intention here, the burden rests with defendants to prove that testator not only intended, but has potentially said, that the estate of Amanda was to be in fee tail.

The history of the litigation in this case is interesting to show how courts may radically differ in their construction of the language of a will, plainly and simply drawn.

Judge Ewing found no difficulty in holding that testator did not contemplate Amanda's death before his own, but held that plaintiffs had not succeeded in overcoming the presumption of law that upon death without offspring the gift

over was too remote. He paid no heed whatever to any argument made by plaintiffs, except to hold that "heirs of John Barber" was too indefinite a term to mean his children. Upon appeal to the supreme court of Pennsylvania it was held that there was nothing in the case to show that testator did not contemplate a long life, and therefore he did contemplate Amanda's death unmarried and without offspring only before his own death, in order to make good the gift over to the Barber heirs. It was distinctly ruled that "*an indefinite failure of issue may at once be dismissed as too remote*," because of the power of sale in the will, and also that "heirs of John Barber"—he being alive—meant his *children*. These latter rulings were what plaintiffs had expressly contended for.

Judge Acheson, in his opinion, refused to apply the construction put upon the will by the supreme court, followed Judge Ewing in ignoring the effect of the power of sale upon the devise; and followed the supreme court in holding the devise over to be to living persons. He followed *Vaughan vs. Dickes* and other cases, where the wills contained the word *unmarried*, as does ours, but contained no power of sale, as does this, and declared that a devise over to named living persons upon the failure of issue of the first taker does not import a definite failure of issue. Plaintiffs did not suggest that the mere devise over to the heirs of John Barber—he being alive—upon the failure of issue of Amanda Stephens imported a definite failure of issue. We urged that all the indicia, hereinafter stated, conclusively showed that such failure of issue was contemplated. The effect of these indicia was totally ignored by the circuit court in the decision of this case.

Plaintiffs relied chiefly upon the case of *Middleswarth vs. Blackmore*, 74 Pa. 414, as authority for this case. In that case there was a devise in fee to testator's son and if my son "*should die without leaving any legitimate issue, then the real estate shall be sold*," and the proceeds of

sale divided amongst living persons. The supreme court held that the power of sale and the direction to divide the proceeds of sale amongst living persons, were "*sufficient evidence that an indefinite failure of issue was not intended.*" This was subsequently said by the supreme court of Pennsylvania to be the sole essence of the Middleswarth case: *Snyder's Appeal*, 95 Pa. 174,181. In this very case that court said that because "*a testator will not be presumed to have intended anything so absurd,*" as "*a power of sale without limit,*" the idea of an indefinite failure of issue in this will "*may at once be dismissed as to remote.*" (See page 13 hereof.)

Yet the circuit court ignored this rule of property in Pennsylvania, and decided this case as if nothing had been said in the will about a *sale* of the lots at Amanda's death.

The Middleswarth and Stevenson wills can be better understood by comparing them thus:

Middleswarth Will.

"In case my son Jonathan should die without leaving any legitimate issue, then the real estate shall be sold, and after the payment of all the specified sums * * * of the balance remaining $1,000 shall be paid by my executors," &c., debarring those grandchildren guilty of certain sins.

A definite failure of issue was sufficiently inferred from the direction to the executors to sell, and to pay the proceeds to grandchildren whose parents had been previously named in the will: 95 Pa. 174, 181.

Further reasons were given, which were not deemed necessary to decide the case to be a definite failure of issue.

Stevenson Will.

"In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold and the proceeds divided equally amongst the heirs of John Barber, of Columbia, Pa."

The above will contains a direction to sell on the death of Amanda, and to divide the proceeds of sale equally amongst the children of John Barber.

A power to be exercised at an indefinite period is absurd, and too remote: 165 Pa. 651.

Further reasons are present in this will to import a definite failure of issue:

(1) *In the event of* meaning *at* or *upon;*

(2) *Then* used in the adverbial sense, signifying time;

(3) Death unmarried, being combined with death if married without offspring.

In the Middleswarth case, 74 Pa. at page 420, Justice Mercur argued that the power of sale, and the direction to divide the proceeds of sale amongst persons named, without more, sufficiently indicated that a definite failure of issue was intended. It is true that he suggested other matters in the will by which "*the intention to refer to a definite failure of issue is further shown.*" It is plainly apparent from the will that these other *indicia* were not regarded as essential to the decision of the case: *Snyder's Appeal*, 95 Pa. 174, 181. The further reasons, indicating a definite failure of issue, were, (1) requiring the payment out of the fund realized from the sale of certain legacies, the payment of which was enjoined upon the son, and (2) debarring from a share in the division any grandchild guilty of sins enumerated.

We have in the Stevenson will the additional reasons, mentioned above, favorable to a restrictive construction of the word "offspring," which are certainly as potent in indicating a restrictive meaning to the words, as the two indications set forth in the Middleswarth case.

We emphatically urge upon this court the fact that in the Middleswarth will, as in the Stevenson will, there was no power of sale conferred upon the executors either by name or description. That case, therefore, did not proceed upon the theory that a personal trust was imposed upon them, so much as upon the theory that the testator directed that the power shall be exercised *at* a certain time; and under the law of Pennsylvania the executor must exercise it, or if dead, the administrator with the will annexed would do so. In the Middleswarth case the administrator recovered in ejectment, and subsequently exercised the power, just as the administrator attempted to do in this case.

It is confidently argued that the following provisions and words of this will abundantly indicate that a definite failure of issue was contemplated:

a. The direction to sell the lots *at* the death of Amanda without offspring; and

b. to divide the proceeds of sale amongst living persons;

c. combining death without offspring with *an event personal to the individual* (death unmarried);

d. the words "in the event of" used in the sense of *at* or *upon;*

e. the word "then," used as an adverb of time.

The direction to sell the lots at the death of Amanda without offspring.

This was one of the chief arguments urged upon the circuit court by plaintiffs in error, and it was totally ignored in the decision of the case.

The principle, that a power of sale to be exercised at the death of the first taker without issue, imports a definite failure of issue, has become firmly established as a rule of property in Pennsylvania, as the following cases prove incontestably:

Taylor vs. Taylor, 63 Pa. 481, 485;
Fahrney vs. Holsinger, 65 Pa. 388, 393;
Middleswarth vs. Blackmore, 74 Pa. 414, 420;
Snyder's Appeal, 95 Pa. 174, 181;
Mitchell, Admr., vs. Ry. Co., 165 Pa. 645, 651,

In the Taylor case the devise over was:

"In case my daughter shall depart this life not leaving lawful issue as aforesaid, it is then my will that my executors, or the survivor of them, shall sell at public sale all my real estate * * * and the net proceeds of such sale, it is my will that it be divided in the following manner" (between persons in being,)

and the court held that this was "*clear implication*" that a definite failure was intended.

Said Justice Sharswood:

> "It is a very significant circumstance as bearing upon the question of intention, if we shall find that the testator contemplated that the devise over should take effect only on a failure of issue at a particular period—the death of the first devisee. Here was an estate in fee, with an alternative limitation over also in fee. This seems necessarily to be implied from the absolute direction to his executors or the survivor of them to sell and convert the estate into money in that event. It was to be done during the lifetime of his executors or the survivor. * * * They were to distribute the proceeds between the children of his own and his wife's deceased sisters or their lawful issue. He certainly could not have had in his mind an indefinite failure of the issue of his daughter, which might be postponed to a very remote period."

In that case the court said that it is an indisputable proposition that if it appear *either* by expression *or* by clear implication, that by the word "issue" the testator meant issue living at a particular period, and not the whole line of succession, it must necessarily be construed to be a word of purchase; and that such intention did appear in that will *both* expressly *and* by clear implication.

In *Fahrney vs. Holsinger*, Justice Sharswood explained the exact scope of *Taylor vs. Taylor* by saying, that therein

> "It was held that a devise over to testator's executors to sell and divide the proceeds after a failure of issue of the first taker indicated clearly that the testator intended a definite failure of issue."

In the Middleswarth case the devise over exactly coincides with the devise over in the Stevenson will.

The will of Moses Middleswarth provided, after a devise in fee to his son.

"That in case my son Jonathan should die without leaving any legitimate issue, then it is my will that the real estate herein bequeathed to him shall be sold, and after the payment of all the specified sums hereinbefore mentioned, (which is enjoined on him to pay) then it is my desire and will that of the balance remaining, $1,000 shall be paid by my executors," &c.

Said Justice Mercur:

> "The declaration that in case Jonathan died 'without leaving any legitimate issue,' then the real estate devised to him should be sold by the testator's executors, and the proceeds be distributed by them, evidently points to a definite failure of issue. It manifestly indicates that this failure will occur during the lifetime of some one of his executors named.
>
> The land in which his wife had a limited estate, after the termination of that estate, was to be sold by his executors, and the proceeds thereof be distributed among the testator's grandchildren. In like manner, upon the death of Jonathan, without leaving legitimate issue, the land given to him *was to be sold*, and the proceeds be distributed by the testator's executors; the residuary portion thereof to be divided among his grandchildren. It is very clear that the testator had the same beneficiaries in his mind in each case."

In Snyder's Appeal, 95 Pa. 174, 181, the Middleswarth case was fully analyzed by Justice Green, and the principle was firmly established, as a rule of property in Pennsylvania, that a direction to sell at a fixed period and to divide the proceeds of sale among living persons imports a definite failure of issue.

He said:

> "In *Middleswarth's Admr. vs. Blackmore*, the devise was to Jonathan absolutely of certain real estate, with a direction that if he died without leaving any legitimate issue, the property was to be sold by the

executors and the proceeds to be given partly in charity and partly to the testator's legitimate grandchildren, by his children who had been previously named. We held, reversing the court below, that the direction to the executors to sell, and to pay the proceeds to grandchildren, whose parents were previously named in the will, were sufficient evidence that an indefinite failure of issue was not intended. Speaking of the direction to the executors to sell, we said: 'It manifestly indicates that this failure will occur during the lifetime of some one of the executors named.' As to the bequest of the proceeds, we said 'all the authorities concur in saying that the devise over should be considered in determining whether the estate should vest on the death of the first taker. In distributing the proceeds of the land in which his wife had a limited use, he gave the names of the several parents of his grandchildren who were to take; thus fixing beyond any question that the recipients should be no further removed from him. In the latter distribution, he does not necessarily repeat the names of the parents of his grandchildren, but evidently had the same persons in view. This excludes the idea that the issue of Jonathan had reference to some remote period of the future."

That this principle was recognized, and full effect given to it, the following quotation from the opinion of Chief Justice Sterrett, in the case of *Mitchell, Admr., vs. Ry Co.*, 165 Pa. 645, 650, unquestionably proves:

It is "the presumption that, in the absense of a fixed period, the power of sale was intended to be exercised at a near, rather than a remote, period after testator's death: Hill on Trustees 474. The circumstances which gave rise to the creation of the power must necessarily change, and perhaps entirely disappear in the lapse of time. 'A power of sale without limit would doubtless,' said Mr. Justice Clark, in *Wilkinson vs. Buist*, 124 Pa. 253, 261, 'be bad, under the rule against perpetuities, and a testator will not be presumed

to have intended anything so absurd.' The intended exercise of the power of sale given in this will is referable to the period either of (1) testator's death, or (2) a definite, or (3)

In the Stevenson will the power of sale appears but twice: first, in the devise over at Amanda's death the "lots are *to be sold*," and "the proceeds *to be divided* equally;" secondly, in the residuary clause all the remainder of testator's "property *to be sold*," and " *to be divided* into sixteen shares." (See page 5, *supra.*) In both instances the direction to sell, and the direction to divide the proceeds of sale, are clothed in identical language—"*to be sold; to be divided.*" The testator's expectation undoubtedly was that his *executors* should sell and divide the remainder of his property, for they were to settle his estate. In that case the sale of the remainder and division of the proceeds of sale could not occur at a remote period after his death. Under the authorities, cited upon page 90 of this brief, consistent construction requires that the same intention be imputed to the testator in case of the power of sale to be exercised at Amanda's death; that was to take place at a failure of issue of Amanda at a definite period. If the first power of sale is capable of two constructions, one of which would render it void upon a ground, which the testator certainly did not intend, and the other of which is reconcilable with the construction, which is necessarily applicable to the second power of sale, can there be a doubt which construction should be followed? The

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to have intended anything so absurd.' The intended exercise of the power of sale given in this will is referable to the period either of (1) testator's death, or (2) a definite, or (3) an indefinite failure of issue. The last may at once be dismissed as too remote."

It has been said that a power of sale, which is unlimited would infringe the rule against perpetuities and would be void:

Farwell on Powers (2nd ed.) 33;

Sugden on Powers 178; and if a testator will not be presumed to have intended such absurdity: *Wilkinson vs. Buist*, 124 Pa. 253, 261; then whenever a gift over upon death without issue is of a power of sale, a definite, and not an indefinite, failure of issue is necessarily intended. This is upon the well known theory that testators are supposed always to contemplate the provisions of their wills becoming effective, and to be lawful; therefore, the will will be so construed that the power of sale must be exercised within the permissible period, rather than beyond that time, when it would be illegal and void.

In *Martelli vs. Holloway*, L. R. 5 H. L. 532, 548 Lord Chelmsford said: "In endeavoring to ascertain the meaning of the testator in a clause of his will, which is ambiguous, and which read in a particular way, sins against the law as to perpetuities, it is not improper to take into consideration that in the whole of the will he has carefully provided that the limitations of his estate shall not be open to the objection of being contrary to that law. And if the clause in question is capable of two constructions, one of which would render it void upon a ground which the testator throughout his will seems to have been anxiously guarding against, and the other of which is reconcilable with all his previously expressed intentions, there can be no doubt which of them ought to be doubted."

Very nearly allied to powers of sale, to be exercised at the death of the first taker without issue, are directions that sums of money be paid upon the decease of the devisee, upon failure of whose issue the estate is given over, in which case a definite failure of issue is presumed to be intended.

Thus, in *Doe vs. Webber*, 1 Barn. & Ald. 713, decided by Lord Ellenborough in 1818, the testatrix, a spinster, devised all her real estate and all the residue of her personal estate to her niece, M. H., her heirs, executors, administrators and assigns forever; and in case M. H. "shall happen to die and leave no child or children," then to another niece, J. B., to her and her heirs forever, "*paying £1,000 unto the executors of M. H., or to such person as she by her last will shall direct.*"

It was held that the words, "leave no child or children" were equivalent to "dying without issue," and that the payment of the £1,000, being a personal provision, and being made to a person or persons, appointed by M. H. in her will, the event contemplated by the testatrix was an approximate and not a remote event, namely, a failure of issue at M. H.'s death, and not an indefinite failure of issue, which might happen at any remote period.

And in *Hill v. Hill*, 4 Barbour 419, the testator devised real estate to a son "and to his heirs and assigns forever," and provided that if said son should "die without issue" then the real estate was devised over to testator's grandson, "subject to the payment of" certain sums of money to named persons, when they should severally become of age. The supreme court held that it was "evident the testator did not contemplate a remote event."

Said the court:

> "The reasons given by Lord Ellenborough apply as fully to the case before us as to the one last cited (*Doe v. Webber*). Here the legacies, to which the executory devise is subject, were personal provisions for

three of his grandsons then living, and by requiring payment to be made when they should severally become of age, it is evident the testator did not contemplate a remote event. There is in truth, more reason for saying so in this case than in *Doe v. Webber*, where the payment was not to be made to a person then living, but to the executors of a person then living."

In *Buchanan's Appeal*, 72 Pa. 448,451, the court said:

"The codicil providing that the survivor should pay the legacies within a *prescribed time* to persons *in esse*, the testator could not have contemplated an indefinite failure of issue, but a failure of issue at the death of William or John, whichever of them should first die. The estate given to William, therefore, might be regarded as a conditional fee, with executory devise over to John; but whatever his estate might be, it became extinct upon his death without issue, and by the limitation of the will passed to John as the survivor."

The direction to divide the proceeds of sale amongst living persons.

"*Heirs of John Barber*" were construed as meaning living persons in the case of *Mitchell, Admr., vs. Ry Co.*, 165 Pa. 645,651.

The court said:

"A consideration of weight is that testator had in view living persons as substituted beneficiaries—the gift over is to the 'heirs,' and, therefore, the children of John Barber who was living—and the natural inference is he intended them to take as such."

The will recognizes John Barber, the ancestor, as living:

(1) by the devise to him of lots 71 and 72;

(2) by the bequest to him of two-sixteenths of the residue;

(3) by the nomination and appointment of him as executor.

This shows that the term "heirs" was not used in its strict sense, but as meaning the *children* of the ancestor named.

There is abundant authority for this position.

In *Goodright vs. White*, 2 William Black. 1010, the testator made separate bequests to his son, Richard Brooking, and his daughter, Margaret White; then followed a devise of certain real estate to R. B. and his heirs male, *and to the heirs* of the daughter, Margaret.

Chief Justice DeGrey said:

> "The question is, whether here is a sufficient designation of the person to make the son of Margaret take *as her heir*, living the mother."

He adds:

> "The intention of the testator is clear that the same favor should be extended to the heirs of Margaret as to the heirs of the body of Richard. He took notice that his daughter was living, by leaving her a term, and a subsequent annuity, and meant a present interest should vest in her heir, that is, her heir apparent, during her life."

A devise to the heirs male of the body of B. *now living* was held by the King's Bench to be a full description of the son of B., who was then alive, and it was adjudged that the estate vested in him, although his father was also alive, the words *now living* being a sufficient designation of the person who was to take under the will.

James vs. Richardson, 1 Ventr. 334.

A New York case is squarely decisive of this point.

Heard vs. Horton, 1 Denio 165, was an action of ejectment. The testator in 1817 made his will, died in 1822, and made a devise and bequest to his son John Budd Horton. He then gave to another son, Jonathan Horton, the remainder of his land, and "if he should die without issue at his decease, the real estate to be equally divided amongst

the heirs of John Budd Horton." When the will was made, John Budd Horton had eight children, and he died in 1841.

Held, that the words *heirs of J. B. H.*, he having children living at the time of making the will, sufficiently designated these children as the executory devisees, though J. B. H. was himself then living, he being referred to in the will as a living person.

Said Justice Beardsley:

"This was a good executory devise. These words do not import an indefinite failure of issue, but a failure *at the death* of the first taker. Such limitation is not within the rule against perpetuties. If the devise is ever to take effect, it will do so at the expiration of the life of the first devisee, and the estate is certain to vest somewhere, absolutely at that time. It can only be necessary to state this principle; it is too well-settled to admit of discussion. (4 Kent's Com. 271, 281, where the authorities are collected.)

He, John B., was then, (at death of Jonathan Horton in 1838) living, and, in strictness, no one can be heir to another person until his decease—*nemo est haeres viventis.*

One may, however, take as purchaser, by the description of *heir*, while his ancestor is living, and this often occurs in devises. In construing devises, the intention and object of the devisor are mainly to be regarded; and any words or description which denote the devisee with reasonable certainty are sufficient. A general devise to the heirs of A., who is a living person, but not referred to as such, would be void, for while A. lives, no one can be his heir. But a devise to the heirs of A., who is stated in the will to be *now living*, would indicate with sufficient certainty the persons intended. This designation would plainly refer to such persons as were at the time heirs apparent to A.—those who would be his heirs if he should then die. * * *

Where the will recognizes the ancestor as living, and makes a devise to his heir, *eo nomine*, this shows

that the term was not used in its strictest sense, but as meaning the heir apparent of the ancestor named. * *

The will in the present case recognized John Budd Horton as a person then in life, thereby showing that the designation of his *heirs as devisees* could not mean those who were strictly such. Understood in that sense, the will would be absurd and contradictory. It would contain a devise to persons as having already succeeded to a deceased ancestor as his heirs, while the same will asserted that the ancestor was still in life and contained a devise to him. Such an absurdity should be avoided. A more reasonable construction should be put upon the words used by the testator; one which avoids what is absurd and gives effect to the will. The words, 'heirs of John Budd Horton,' may well be understood as meaning his children. In common language, children are so called in the lifetime of their father, and they are his heirs apparent. This construction gives effect to the devise, and, I cannot doubt, is according to what the testator really intended."

Combining death without offspring with an event personal to the individual.

Words importing a failure of issue are restrained to such failure *at the death*, in regard to real estate, in every case in which a dying without issue is combined with *an event personal to the individual*; as the event of his dying without issue and unmarried.

3 Jarman on Wills (R. & T. ed. 1881) 309;
Downing vs. Wherrin, 19 N. Hamp. 9;
Wilson vs. Bailey, 3 Bro. P. C. 195.

This principle of construction is well exemplified in a case, where the devise was to a testator's wife for life, with remainder to his nephew, Samuel, and his heirs, but in case his nephew should die before he attained the age of twenty-one, or after he should have attained such age of twenty-one, should die unmarried, or having been married, should die without lawful issue, then over.

Held, that the nephew took an estate in fee, with an executory devise over on the happening of any of the three specified events, and that the last event was his death without leaving issue surviving him.

Baron Martin said:

> "The estate expressly devised to him was an estate in fee simple 'to him and his heirs forever.' Then there came a proviso, first, if he should die under twenty-one; secondly, if he should die after twenty-one unmarried; thirdly, if he should die, having been married without lawful issue.
>
> "Now the first two events directly point to the period of his death and we think it would be a very forced construction of the devise to hold that the third event pointed, not to his death without leaving issue then living, but to the failure of issue of his body at any period, however remote. The same words 'shall die' are in the devise directed to both events, viz.: 'being unmarried' and 'without lawful issue,' and we think that it was the state of things existing at Samuel's death, which was to determine whether the future estate was so come into enjoyment or not."

Johnson vs. Johnson, 8 Ex. 81.

In our case the devise over is upon *death unmarried, or if married, death without offspring;* it is to become effective upon either of two separate and distinct contingencies. If effective upon the first one, it is necessarily at the time of Amanda's death; if upon the second one, it would be a very forced construction of the devise to hold that the second event pointed, not to her death without leaving offspring then living, but to the failure of offspring at any period however remote. The word "dying," used twice, is in the devise directed to both events, viz: being "unmarried" and "without offspring by her husband," if married.

In the leading case of *Eichelberger vs. Barnitz*, 9 Watts 447, 450, Justice Sergeant said:

> "If he die unmarried and without issue * * * the testator has been considered as meaning a failure of issue within a fixed period, and not an indefinite failure of issue."

In *Rapp vs. Rapp*, 6 Pa. 45, the question was whether under the devise over in case any of testator's children should die unmarried and without lawful issue, the share or portion of him or her so dying, should revert back to the survivors, share and share alike. The court followed the case of *Deihl vs. King*, infra., in which there was a limitation over of a legacy upon the death unmarried and without issue, and held the gift over to be good as an executory devise and not too remote.

In *Deihl vs. King*, 6 S. & R. 29, there was a gift over after an absolute bequest; should the legatee die *unmarried and without issue*, and it was held to be upon a definite failure of issue.

To the same effect and involving substantially the same language is the case of

Kelso vs. Dickey, 7 W. & S. 279.

Such was the current of decision in Pennsylvania until the cases of

Vaughan vs. Dickes, 20 Pa. 509;
Matlack vs. Roberts, 54 Pa. 148; and
McCullough vs. Fenton, 65 Pa. 418.

The first of these cases held, that as issue cannot be lawful without marriage, the marriage condition is surplusage, and the sentence may be disencumbered of it. This case was followed in the last two cases with strong disapproval.

The following criticism of these cases and explanation of the proper rule of construction in case of a devise of a

devise over upon death *unmarried* and *without issue* by Justice Sharswood is to be found in 2 Ldg. Cas. Am. Law of Real Prop. 501, which is quoted at length:

"The authorities are to the effect that the introduction of the condition of an unmarried state on the part of the first taker will not cause the dying without issue, upon which the devise over is to take effect, to be regarded as definite. In *Vaughan vs. Dickes*, 20 Pa. St. 509, the testator, after giving his property in fee to his own son, made a devise over thereof "should my son, Peter Dickes, not marry, and have lawful issue." The court held the devise over void for remoteness, avowedly disregarding the condition of marriage. *Woodward J.* in delivering the opinion of the court, saying: "As Peter could not have lawful issue unless he married, we may disencumber the sentence of the marriage condition." This case entirely overruled the exception mentioned in the dictum of *Sergeant J.* in *Eichelberger vs. Barnitz*, 9 Watts 447 "Or if he (the first taker) die unmarried and without issue." From the decision of the court, *Black, C. J.*, dissented. The question was again argued in *Matlack vs. Roberts*, 54 Pa. St. 148. The devise over was "in case of the death of either of my children unmarried or without issue." The court followed *Vaughan vs. Dickes*, and held that the failure intended was an indefinite one, although with seeming unwillingness; for *Agnew J.* in delivering the opinion, said: "Had it not been for the decision of *Vaughan vs. Dickes*, 8 Harris 509, I would have thought the case fell within the exception stated by *Sergeant J.* in *Eichelberger vs. Barnitz*, 9 Watts 450, that a devise over, the devisee dying *unmarried* and without issue, indicated a failure of issue within a definite period. But, in *Vaughan vs. Dickes*, it was held (the present Chief Justice delivering the opinion) that dying before marriage indicated nothing definite in the period when the failure of issue should take place." This case was

followed in *McCullough vs. Fenton*, 65 Pa. St. 419; in which case SHARSWOOD J., while looking upon the question as settled, said that, were it *res integra*, he should concur in the doubt expressed by AGNEW J. The doctrine of these cases, opposed as it is to the dictum of SERGEANT, J., the dissent of Chief Justice BLACK, and the doubts of Justices AGNEW and SHARSWOOD, may be established by authority, but it certainly seems opposed to reason. One would, at first glance, suppose that nothing could show more plainly than the introduction of the condition of the unmarried state at the time of death, and failure of issue, that the failure intended was on the death of the first taker. Death unmarried, by the most liberal and wide construction, can mean but two things: (1) that the person named has never married, and dies a bachelor; (2) that he has married, and his wife has died before him. The former meaning is the one probably meant in all cases in which it is used. In common parlance 'an unmarried man' means a bachelor; we speak of a widower as a 'widower.' Now, if a person die a bachelor, he can have no legal issue, and therefore, if the devise be taken in the first sense, the failure of issue, which would in any way come within the terms of the will, must be at his death, and at no other time; for the moment he marries, the contingency upon which the executory devise is to take effect becomes impossible, and the estate given thereby is defeated.

This becomes more plain, when we remember that the same court, which decided the above cases has also held that a good executory devise may be made on the non-marriage of the first taker. Thus in *Griffith vs. Woodward*, 1 Yeates 316, the testator made a devise over: "If either of my said sons shall happen to depart this life, unmarried and without lawful issue, that then the survivor of them is to enjoy all the estate of his deceased brother." It is true, the question of survivorship came into the cause; but the court (SHIPPEN, C. J., and YEATES, J.) in delivering its opinion

went most strongly on the ground that the testator's intent was that the sons should marry, and held that a marriage even without issue would defeat the devise over, saying: "In the will before us, the sense of the testator is clear and entire from the words he has used. He probably intended to tempt his sons to marry, and therefore subjected their lands to that condition. Would it be reasonable or consonant to their father's meaning, if either of them formed such a connection, that he should not have it in his power to make a provision for his wife in case she survived him?" And in *Jessup vs. Smuck*, 16 Pa. St. 327, decided in 1851, less than two years before *Vaughan vs. Dickes*, non-marriage was regarded as a good cause of defeasance.

From the analogy of these cases, as well as upon general reason, it would seem that, attaching the ordinary signification to the term '*unmarried*,' the case of *Vaughan vs. Dickes* is not sustainable.

But taking the second and less common meaning, that a testator should mean that if the first taker died a widower and without issue living at that time, the estate should go over, is perfectly reasonable and comprehensible; and there is the case of a definite failure of issue; but in order to uphold the construction of an indefinite issue, and yet give any force to the word unmarried, we must take the testator's meaning to be, that if the first taker survive his wife, then on failure of his issue at any time, the estate shall go over; but if the first taker should die leaving a wife, then his estate shall never go over, for the first taker would not have died unmarried. No reason for such distinction can be imagined; it is hardly to be supposed that the regard of the testator for the devisees over, or his desire to benefit them, is dependent upon the contingency of survivorship of the husband or wife, when, no matter which survives, immediate issue is left. On the whole, then, it seems to us that the rule laid down in *Vaughan vs. Dickes*, while it may be binding

authority in Pennsylvania, should not be followed in any of those states where the question of the effect of the introduction of the condition of dying in an unmarried state is *res integra*, and that the opinion, more consonant to reason and probability, is that when the testator makes the devise over dependent upon the dying unmarried and without issue of the first taker, he intends thereby a definite failure at the time of the first taker's death."

In *Downing vs. Wherrin*, 19 N. Hamp. 9, testator devised to his son, in fee, all his land, and if my son "should not marry and have lawful issue of his own body, after his death" over to his brothers, nominatim, in fee.

Chief Justice Gilchrist said at page 86:

"Did the testator in this case intend that the devise over should not take effect until all the descendants of Josiah should become extinct, however remote they might be, or did he intend that it should take effect at the death of Josiah, if there was no issue of his living at that time? This is the simple question now before us. Is there anything to point out the time when the testator intended the devise should take effect?

If the failure of issue would be an event ascertained at the death of Josiah, it would seem that the testator could not have contemplated the failure of Josiah's remote descendants. Now, if Josiah should not marry and have lawful issue of his own body, at what time are his brothers to take? The will answers this question. It is *after his death*, that is, *upon his death;* as soon as he is dead; and this seems to us to be the simple and obvious construction of the will, to show that he meant that if Josiah left no issue surviving him, the land should go to his brothers and to repel the idea that he contemplated some remote period when his issue should become extinct in some future generation. It was the state of things existing at the time of Josiah's death,

which was to determine whether the future estate to his brothers should ever come into enjoyment or not.

The failure of issue will be confined to the death of the first taker, where the expression is combined with some event personal to the devisee, as in case of his dying unmarried and without issue, the word *and* being construed to mean *or*. *Wilson vs. Bailey*, 3 Bro. P. C. 195, is one case of this kind. There, in case both of the sons of the testator, M. and J., should happen to die unmarried, and neither of them should have any issue lawfully begotten, certain leasehold estates devised to them were devised over. M. died unmarried; J. married, but had no issue, and it was held that the devise over took effect, the word *and*, connecting the two parts of the condition, being construed in the disjunctive.

Here the condition is, that M. should die unmarried, and should not have issue lawfully begotten. If either of these events should happen the devise over would be good.

In the present case the condition is that Josiah should not marry and have lawful issue. Construing it like the case cited, if either event should happen, the devise would be good, and both are matters personal to the devisee."

The supreme court of Pennsylvania in *Mitchell, adm'r., vs. Ry. Co.*, arbitrarily read this devise "*in the first instance to Amanda, and in the event of her dying without issue, over*" (supra, page 12) and treated the word "unmarried" as unimportant in the construction of the will. It has been shown that such method of interpretation is never resorted to in the substitutionary construction, applied by that court to this will, and that this will was disencumbered of the marriage condition in pure violation of authority. (See page 78 supra.) It hardly needs citation of authority to prove that "it is a clear rule in the construction of a will that you cannot reject any words if they have an intelligible meaning:" *Coltsmann vs. Coltsmann, L. R. 3 H. L. 121 136;* and that "the intention is to be collected from the

whole will taken together. Every word is to have its effect, and is to be taken according to its natural and common import, and the court are bound to carry the will into effect, provided it is consistent with the rules of law." Sir R. P. Arden in *4 Vesey 329.*

And in *McCullough vs. Fenton, 65 Pa. 418, 427*, Justice Sharswood said:

> "The rule is an established one to give effect to every word, when it can be done, and these words (not being married) ought not to be rejected if they indicate that the intention of the testator was not an indefinite failure of issue or an estate tail, but a substituted or alternative fee. Now in this latter view they are important and very significant."

It is impossible to read the devise as did the Pennsylvania supreme court without reading out of this will not only the word "*unmarried*," but also the words "*married*" and "*dying.*" This devise of the will was carefully and laboriously constructed; every word was designed to have a meaning; and, unless there is good reason to the contrary, effect should be given to every word.

If we impute to the words *unmarried* and *married* their usual meaning, we have the devise to mean *in the event of Amanda dying, never having married, or if having married, dying without offspring by her husband then* over; the failure of issue, which would come within the terms of the will, must be at Amanda's death, and at no other time; because if she never marries, she cannot have the contemplated issue, the failure thereof must necessarily be definite, and the gift over would then become operative. Marriage in this devise cannot defeat the executory devise over, as it was held it could do in *Jessup vs. Smuck, supra*, because the testator here makes the same executory gift over to the same persons if *married without offspring*, &c. If the gift over

upon the happening of the first contingency be upon a definite failure of issue, it necessarily results that the same gift over to the same persons upon the happening of the second contingency must be at a definite period. It would be a forced and unreasonable construction of the devise over to have it take effect at a definite time in the one instance and at an indefinite time in the other instance.

Testator having used the words *unmarried* and *married*, it is most reasonable to suppose that he intended them to have their usual meaning; and the fact that he used both words is strong evidence that he contemplated that full effect should be given to both. This apparent intention is put beyond all doubt, when it is observed that the word *dying* is used twice in the devise—*dying unmarried*, and if married, *dying without offspring by her husband*. It is confidently urged that the Pennsylvania case of *Vaughan vs. Dickes*, and those cases which follow it with disapproval, furnish no rule for decision upon this point. The language of those cases was *unmarried and without lawful issue*, and the court ruled that *unmarried* might be dispensed with because *lawful* imported the idea of marriage, a requisite for legitimate issue. In this devise if *unmarried* be dispensed with, the words left form a meaningless jargon; and order cannot be brought out of this chaos, unless we proceed with the task of further ridding the sentence of words. This results not in the construction of a will, but in making a new will for the testator.

We find that the Pennsylvania decisions upon this point are not by any means in harmony with each other. The earlier cases held that in devises the word *unmarried* imported a definite failure of issue; the same rule has *always* been followed in case of bequests; why have one rule for devises of realty and another for bequests of personalty? The later cases in respect to devises, if settled, are in conflict with the early ones. The decided weight of other authority is upon the side of the early Pennsylvania

cases. Shall this court follow these cases, which lead to the defeat of the testator's very manifest intention, or will it rather decline to follow *Mitchell., Admr., vs. Ry. Co.* in this particular, which it can do under the ruling in *Lane vs. Vick, supra,* (page 22 hereof); and refuse to apply *Vaughan vs. Dickes* to the language of this will, which is so different. In *Vaughan vs. Dickes*, 20 Pa. at page 514, it was said by the court that it did violence neither to the language nor to the intention of the testator by applying the construction it did to that will. The same cannot be said of that construction, if applied to this will.

It is a principle of general application to hold that a gift over upon death under age and without issue is defeated if the devisee attain full age, yet the following case was held to be an exception to that rule, where the devise over was to take effect in case the testator's son should not live to attain twenty-one, *or, in case he should live to attain such age, but should afterwards die without lawful issue*, and the son attained twenty-one, and it was held that he took a fee with an executory devise over in the event of his dying without issue living at his death.

Glover vs. Monckton, 3 Bing. 13.

This case was an authority for the decision of *Johnson vs. Johnson*, supra., (page 79 hereof), and if we substitute in the proper places the words *unmarried* and *married* we have the case identical with the words of our case.

In the event of Amanda dying, means at or upon the death of Amanda and imports a restrictive construction.

It is true that the usual signification of the words (*in the event of*), standing alone, is *if*; but the testator has used the expression three times in his will, and in two places they necessarily mean *at* or *upon*, because otherwise they have no sensible import; and in the third place the same meaning must be imputed to them, because such imputation

is according to a well settled rule of construction, is in accord with testator's apparent intention, gathered from the context, and makes perfectly good sense.

(1) In the preamble of the will, "I * * * reflecting on the certainty of death and desirous of making a distribution of my property *in the event of my decease*, do hereby declare," etc.

The expression here must mean *at* or *upon*. They can have no other consistent and reasonable meaning. Testator desired to make a distribution of his estate *at* his death; then how could it be said that he was reflecting on the *certainty of death*, an event of all others the most certain and inevitable, and then declare a scheme of distribution of his estate *if* he die? Would he recognize the happening of death as *certain* and publish a will to take effect upon an uncertainty?

(2) In the devise of lot 73 to Eliza Stevenson, "*and in the event of her death* the lot to go to her sister's children," the words have undoubtedly the same import. The testator here devised a life estate to Eliza Stevenson with remainder to her nephews and nieces.

(3) "*In the event of Amanda dying*," etc., must mean *at* or *upon Amanda's death*. The words are not here used in a conditional sense. No such inference is to be drawn from the use of the words "if married," immediately afterwards.

The testator was providing for a gift over upon Amanda's death, unmarried or if married. The *condition* of Amanda was described by the words "*unmarried or if married without offspring;* the gift over upon that condition was *at* Amanda's death.

The word's, "*in the event of*," are used in all three places in reference to the same thing—*death:*

a. "In the event of" testator's death;

b. "In the event of Amanda dying;" and

c. "In the event of" Eliza Stevenson's death.

The eighteenth rule for the construction of wills given by Mr. Jarman is:

"That words, occurring more than once in a will, shall be presumed to be used always in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject."

3 Jarman on Wills (R. & T. ed. 1881) 707.

Said Lord Chancellor Sugden:

> "It is a well settled rule of construction, and one to which from its soundness I shall always strictly adhere, never to put a different construction on the same word, where it occurs twice or oftener in the same in-instrument, unless there appear a clear intention to the contrary."

Ridgeway vs. Munkittrick, 1 Dru. & Warren 84, 93.

The rule was followed in the cases of

Peel vs. Catlow, 9 Sim. 372, and

Clavering vs. Ellison, 3 Drewry's Rep. 451,

and has been adopted in Pennsylvania.

Said Justice Sharswood:

> "In the will before us these words are found three times in the same paragraph, within a few lines of each other. In the first two they are evidently used in the sense of a definite failure of issue. * * * * * When, therefore, she concludes her limitation with the same words, 'should both of them die without issue,' the inference is unresistible that she used the words in the same sense that she had done before."

Ingersoll's Appeal, 86 Pa. 240, 246.

> The phrase *in the event of*, meaning *at* or *upon*, we find it to be the rule of construction to hold that a definite failure of issue is contemplated by a devise over *at* or *upon* death without issue.
>
> *3 Jarman on Wills* (R. & T. ed. 1881,) 320, 321.

The following cases show that such is a well settled rule of construction:

In *Doe d. King vs. Frost*, 3 B. & Ald. 546, the devise was to a son in express fee simple, and if the son "should have no children, child or issue, the said estate is *on the decease*" of the said W. F., to become the property of the heir at law; it was held to be a fee with an executory devise over to the person, who, on the happening of the event contemplated by the will, should become the heir at law of the testator.

Mr. Justice Bayley, of the court of King's Bench, says:

> "Here the will gave the estates to William Frost, and his heirs forever, and if he had no children, child or issue, the estate was on his decease to become the property of the heir at law. It does not seem to me that this contemplates a devise over on an indefinite failure of issue, but only on the failure of issue at the time of William Frost's death."

Mr. Justice Holroyd said:

> "I think, in the present case, that the estate was not to go over upon an indefinite failure of issue; for the contingency is that the estate is, if William Frost have no children, child or issue, *at his decease*, to go over to the heir at law. The will, therefore, contemplates a failure of issue at the decease of William Frost, and the estate in fee is not converted, by the subsequent limitation, into an estate tail."

In *Ex Parte Davies*, *2 Sim. (N. S.) 114*, where lands were devised to M. in fee, and in case M. should die without leaving any lawful issue of his body, the lands were *at*

his death devised to C. and F. in fee, in equal shares; Sir R. Kindersley, V. C., said that no distinction could be made between "at" and "on," and decided on the authority of *Doe vs. Frost* that M. took an estate in fee, with an executory devise over in case he left no issue living at his death.

In *Parker vs. Birks*, 1 K. & J. 156, where a testator devised lands to his nephew A., his heirs and assigns forever; but in case A. should die without child or children of his body lawfully begotten, he devised the same lands to the children of his niece B., their heirs and assigns forever *on the decease* of the said A.; it was held by Sir W. P. Wood, V. C., that A. took an estate in fee simple, subject to an executory devise over in case he died without issue living at his death.

Failure of issue is restricted to failure at the death of the parent if the devise is on failure of the issue of A., then "at" or "on" the death of A. over.

It makes no difference whether A. takes the fee or only a life estate owing to the absence of words of limitation.

Theobold on Wills (2d ed.) 543;

Coltsmann vs. Coltsmann, L. R. 3 H. L. 121.

In this case testator devised and bequeathed to his son, John Coltsmann, "all those my property, lands, tenements and premises at and about Flesk Castle," and also "my lands, tenements and premises at Dick's Grove." He afterwards made a codicil, in which he said: "If it should happen that my son, *John Coltsmann, die without heirs of his body*, lawfully, etc., in that case, and in default of such heirs, I do hereby devise and direct that my lands, etc., at Flesk Castle * * * * and also my lands at Dick's Grove," all subject to an annuity to his wife, and with reasonable provision for his son's wife, "shall, *at my son's death*, descend and be transferred to my grandson," D. C. *Held*, that, as to both

devises, the words "at my son's death," restrained the words "die without heirs of the body" to a failure of issue at the son's death.

This case was argued by very eminent counsel and was decided by Lords Cairns, Cranworth, Chelmsford and Colonsay. All but the last delivered opinions.

Said Lord Chelmsford at page 136:

> "If the words 'at my son's death' had not been in the devise contained in the codicil, there would have been little difficulty in holding that the words 'if it should happen that my son, John Coltsmann, die without heirs of his body,' would, in the case of *Flesk Castle*, have cut down the estate in fee to an estate tail, and in the case of *Dick's Grove* would have enlarged the life estate into an estate tail. But reading the clause with the words 'at my son's death,' and collecting the testator's meaning from the whole of the clause, it appears that the only event contemplated by the testator, upon the happening of which *Daniel Cronin* was to have both estates, was the death of *John Coltsmann* without heirs of his body then living."

"Then" is here used as an adverb of time, and not as a particle of reference.

"Then," when read in conjunction with the phrase *in the event of*, meaning *at*, emphatically fixes the time of Amanda's *death* as the period of failure of her issue.

"Then" refers to the happening of such death. Death was an event which must necessarily happen. It is, therefore, an adverb of time. The word is never a particle of reference, except when it relates to the determination of the first limitation in the estate, when the contingency arises, if the thing is contingent: *Hauer vs. Sheetz*, 3 Yeates 205, 244.

In *Deihl vs. King*, 6 S. & R. 29, was an absolute bequest, and if the legatee "should die unmarried and without issue, that then and in such case" the bequest should go

over, and it was held that "there are many restrictive indications; 1st, the word then; in *Pinbury vs. Elkin*, 1 P. Wms. 563, *then* was construed an attribute of time; *then* immediately after his decease."

So in *Snyder's Appeal*, 95 Pa. 174, testator directed all his real estate to be sold and the proceeds divided, etc., and "in case my said grandson shall at any time die without issue, I then give and bequeath the bequest of him," etc. *Held*, that it was evident the testator intended a definite failure of issue at the time of the grandson's death. Justice Green said at page 182:

> "The failure of issue contemplated by the testator must have been such as would naturally occur within the lifetime of the substituted legatees or some of them. * * * * * (Quoting the language of the bill.) That is, at whatever time Allen dies, *then*, viz., *at the time of his death*, the bequest to him *so dying* shall go to the testator's children. * * * This expression *then*, in connection with the limitation over, received precisely this construction in the case of *Pinbury vs. Elkin*, 1 P. Wms. 563."

Miller's Estate, 145 Pa. 561, was a gift of both real and personal estate to a grandson, but, if said Albert should die before he has any heirs, then his share shall revert back among my other heirs. Said Justice Sterrett:

> "It is very evident that in the present case a definite failure of issue was intended. The contingency upon which the gift over is dependent, must, by the very terms of the will, happen 'before' the death of Albert. * * * When Albert died, '*then*' it must certainly be known and ascertained whether or not he had any heirs. The word 'heirs' was not used or intended to be used as a word of art, but in the sense of children; for, *nemo est haeres virentis*."

In this case it was said that in *Snyder's Appeal*, supra, "that the use of the words 'at any time' and 'then' imported a definite failure."

In *Gormley's Estate*, 154 Pa. 378, the fund for distribution was composed of both realty and personalty given to a granddaughter, and if "she should die, either before or after my death (*i. e., at any time*, as construed by the court), and leave no child or children (*i. e., issue*) to survive her, then (*i. e., at her death without issue*) this legacy and devise to her is to revert to my three children aforesaid." The lower court said that "the meaning of the words used in *Snyder's Appeal* appears to be identical with those used here. It follows, therefore, that a definite failure of issue was intended."

This case was affirmed by the supreme court upon the opinion of the lower court.

Plaintiffs in error must recover, in whichever aspect the primary devise to Amanda be viewed, whether it be held to give a fee or a life estate.

If a fee, she took a qualified fee, defeasible by her death without leaving offspring by her husband to survive her; *if a life estate*, there was an implied remainder to such offspring in fee; with a limitation over in both instances by way of executory devise, if she should die without such offspring living at her death.

Taylor vs. Taylor, 63 Pa. 481.

To recapitulate:—

It is respectfully urged that under no reasonable construction of this will, giving effect to the probable intention of the testator, was it intended to give to Amanda either an absolute fee simple, or an estate tail in the lots. It was the plain intention to give to her a fee in the lots, to become absolute if she should die leaving offspring by her husband, and to be defeasible if such offspring should not be living at the time of her death.

The intention to restrict the words, "*dying without offspring by her husband,*" to a failure at a definite time is apparent from the following reasons:

(*a.*) *Offspring* primarily means *children*, and, therefore, by *expression* those words have a definite sense.

(*b.*) If offspring be deemed to be equivalent to *issue*, in its indefinite sense, the application of such legal and indefinite sense operates in this case, as in most cases, to defeat the testator's meaning, and to impute an absurd meaning to the phrase "*die without issue.*" Courts, therefore, "*anxiously seize*" upon any expression or circumstance in the will, which will give the *vulgar* or popular sense to the phrase. The following expressions and circumstances in this will abundantly prove that the latter sense was the one designed by the testator:

(*c.*) The direction to sell the lots at the death of Amanda, under either the contingency of death *unmarried*, or the contingency of death if married *without offspring by her husband*, imports a definite failure of issue. The testator directs the *conversion* of his real estate to be made. This power could not be without limit without offending the rule against perpetuities. A testator will not be presumed to have intended such absurdity. If the will is capable of two constructions respecting the exercise of this power, the one void, because a perpetuity, and the other valid, because within the time allowed by law for its exercise, the law will so construe the will that the power may be held to be good, and will prefer the latter time. Giving the latter construction to the power in this will, we have a gift over of *proceeds of sale* to the Barber heirs, which is necessarily upon a definite failure of issue.

Nearly allied to powers of sale, to be exercised at the death of the first taker without issue, are directions for the payment of money upon the decease of the devisee, upon whose failure of issue the estate is given over. In these

cases a definite failure of issue is always presumed to be intended.

(*d.*) The devise over is always to be consulted in the solution of this question. Here the devise over is *at* a particular period *to* a particular class of persons. "*Heirs of John Barber*," he being alive, and recognized by the testator in his will, as being alive, mean the children of John Barber. If the words have no such sense, we have the absurdity of the testator devising to persons, as having already succeeded to the deceased ancestor, as his heirs, while the ancestor was still in life and was the beneficiary of the testator by a devise in the same will.

(*e.*) Combining death without offspring with an event personal to Amanda (*i. e.* her death unmarried and without issue) has always been deemed to import a definite failure of issue. The Pennsylvania cases upon this subject are not in harmony. The later cases seem to overrule the earlier cases, and a different rule is applied by the courts to bequests, than is applied to devises. The cases upon bequests over upon death unmarried and without issue have unanimously held that a definite failure of issue was intended. The later cases respecting such devises over have been severely criticised by the Pennsylvania judiciary. The early decisions upon such devises over are in exact harmony with the best general authorities upon the subject. This court, therefore, does not feel itself bound to follow the later decisions because it has said:

> "When the decisions of the state courts are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions."

Pease vs. Peck, 18 Howard 595, 599.

In *Britton vs. Thornton*, 112 U. S. 526, 532, this court held that "by this specified evise, Eliza Ann Thornton took an estate in fee defeasible by an executory devise over."

It will be remembered that this devise over was on the contingency of Eliza Ann dying under age and without issue then living.

(*f.*) The words "in the event of" unquestionably mean *at* or *upon* the death of Amanda. A devise over *at* or *upon* death without issue has invariably been held to be upon a definite failure of issue.

(*g.*) "Then" is an adverb of time and more emphatically marks Amanda's death as the definite period of the failure of her issue. There is no merit in the probable argument of defendants that the word "then" cannot restrict the failure of issue to a definite period in case of devises. It unquestionably has that effect in case of bequests, as the cases cited herein show. If it means *time* in the one case, it has the same meaning in the other. While, *of itself*, it might not restrict the failure of issue to a definite period in case of devises, it is unquestionably one of the many *indicia* in this will denoting such failure, and, along with the other *indicia*, performs its part in effectuating such restrictive construction.

(*h.*) It is important to remember that the supreme court of Pennsylvania, in affirming the judgment of the court of common pleas of Allegheny county, refused absolutely to follow the latter court in construing this devise to be a fee tail. Had the former court thought such construction at all applicable it would have adopted the reasons which were entertained by the lower court. The fact that, while the judgment was affirmed, the reasoning of the lower court was repudiated in every particular, is one of the strongest arguments we can urge that the common pleas court and the

circuit court were wrong in holding this to be a fee tail The judges of both those courts utterly ignored the power of sale in the will and held that a fee tail was intended: the supreme court held the power of sale to be the one prominent indication that a fee tail was not intended.

(*i.*) This action is based upon no stale or concealed claim. Plaintiffs' right to sue did not accrue until Amanda Stephens died on September 21, 1891. The first ejectment was begun on March 20, 1893, only eighteen months after her death. Plaintiffs' title was apparent to, and known by, the purchasers from Amanda Stephens, because the will set it forth, and because she and her vendees attempted to destroy it by barring the supposed entail. With eyes wide open, the defendants took the risk of their construction of the will being the correct one.

Even if the estate given to Amanda had been an estate tail, the barring of the entail was the defeating of the testator's intention by the application of a statute, based upon reasons of public policy and not based upon any legal or moral right of the primary devisee. "An estate tail may be subject to an executory devise over on some condition or event to take effect in abridgment or derogation of it."

Taylor vs. Taylor, 63 Pa. 481, 485.

It is clear, therefore, that even if the estate given had been of that character, the purchasers could not defeat plaintiffs unless they showed that the proceedings to bar the entail

had been regular and in strict conformity with the statute. He who seeks to defeat the lawful intention of a testator has no equity. He must show a strict legal right.

But this was no estate tail. It needs no argument, therefore, to show that there is no equity in the defendants, which ought to weigh in the determination of the questions before the court.

All of which is respectfully submitted.

S. Duffield Mitchell,

John S. Ferguson,

Attorneys for Plaintiffs in Error.

Pittsburgh, Pa.

April 15, 1896.

(See page 48 for correction.)

IN THE

Supreme Court of the United States.

No. ~~885~~ OCTOBER TERM, 1895.

SAMUEL WHITEHILL BARBER, RICHARD TREET LEECH, and MARY ANN LEECH, HIS WIFE, IN RIGHT OF SAID WIFE; EDWARD P. CLARKE, GEORGE HEPBURN WATSON and ANNA TOWNSEND WATSON, HIS WIFE, IN RIGHT OF SAID WIFE, and CARVER WORTHINGTON BARBER, respectively citizens of the State of Missouri, Ohio, New Jersey and Minnesota,

PLAINTIFFS IN ERROR, PLAINTIFFS BELOW,

431.

versus

THE PITTSBURGH, FT. WAYNE & CHICAGO RAILWAY COMPANY, and THE PENNSYLVANIA COMPANY, LESSEE, both corporations and Citizens of the State of Pennsylvania,

DEFENDANTS IN ERROR, DEFENDANTS BELOW.

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

[16,175.]

BRIEF FOR DEFENDANTS IN ERROR

JOHNS McCLEAVE,
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Attorneys for Pittsburgh, Ft. Wayne & Chicago Ry. Co.

WM. SCOTT,
GEO. B. GORDON,
Attorneys for Pennsylvania Company.

IN THE

Supreme Court of the United States.

No. 885 OCTOBER TERM, 1895.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH, and MARY ANN LEECH, HIS WIFE, IN RIGHT OF SAID WIFE; EDWARD P. CLARKE, GEORGE HEPBURN WATSON and ANNA TOWNSEND WATSON, HIS WIFE, IN RIGHT OF SAID WIFE, and CARVER WORTHINGTON BARBER, respectively citizens of the States of Missouri, Ohio, New Jersey and Minnesota,

PLAINTIFFS IN ERROR, PLAINTIFFS BELOW,

versus

THE PITTSBURGH, FT. WAYNE & CHICAGO RAILWAY COMPANY, and THE PENNSYLVANIA COMPANY, LESSEE, both corporations and Citizens of the State of Pennsylvania,

DEFENDANTS IN ERROR, DEFENDANTS BELOW.

On Certificate from United States Circuit Court of Appeal for the Third Circuit.

[16,175.]

BRIEF FOR DEFENDANTS IN ERROR.

The property, title of which is in dispute, is a large and very valuable parcel of land, situated upon Penn avenue, in the city of Pittsburgh, now covered with tracks, freight depot and main office building of the Pittsburgh, Ft. Wayne & Chicago Railway Company. The title comes through the will of James S. Stevenson, the proper construction of which is involved in this case. As long ago as 1848 competent counsel advised that the said will created an estate tail in Amanda Stephens, and proceedings were had to bar the entail, converting Amanda's estate into a fee simple under the Pennsylvania statute. Several years afterwards another lawyer advised the predecessor in title of the Pittsburgh, Ft. Wayne & Chicago Railway Company that Amanda held a fee simple estate, and upon such advice Amanda's title was purchased as such.

In the present litigation the question was argued before three Judges of the Court of Common Pleas No. 2 of Allegheny county, Pennsylvania, presided over by Judge Ewing, who is as good authority in questions of title as we have in Pennsylvania. Upon appeal the case was presented to the Supreme Court of the State, composed of seven Pennsylvania lawyers. It was afterwards presented to the Circuit Court of the United States, before two other Pennsylvania lawyers, making fourteen Pennsylvania lawyers who have been called upon to pass upon the question involved, and, without an exception, they have all held that the defendants have a fee simple title, and that the plaintiffs have none. This consensus of professional opinion is, however, again challenged.

The controversy arises upon the following provisions of the will of James S. Stevenson, deceased:

> "I, James S. Stevenson, of the city of Pittsburgh, in the State of Pennsylvania, aged fifty years on the 12th day of January, 1831, reflecting on the certainty of death, and desirous of making a distribution of my property in the event of my decease, do hereby declare this writing to be my last will and testament, made this 12th day of March, in the year of our Lord one thousand eight hundred and thirty-one.
>
> "I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69 and 70, in the city of Pittsburgh, in their full extent, bounded by Penn street, Wayne street, the Allegheny river and by lot 71. Said Amanda Stephens is now five years old (born April 7th, 1826.) Stephens and Stephens, his wife, the parents of Amanda's mother, live near Connellsville, Fayette Co., Pennsylvania.
>
> "In the event of Amanda dying unmarried, or if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Pennsylvania. * * *
>
> "I hereby constitute and appoint the said Charles Avery, J. M. Snowden and John Thaw and John Barber the executors of this, my will.
>
> "Signed at Pittsburgh this 11th day of March, 1831. "JAS. S. STEVENSON."

The testator died October 16th, 1831. His will was probated before the register on the 18th day of the same month and year—two days after his death.

Amanda Stephens survived the testator, and, in the year 1847, intermarried with Samuel Haight and by him had offspring. On July 27th, 1848, Amanda and her husband, by deed to Jacob Haight, executed, acknowledged and recorded, in accordance with the provisions of the statute for barring

estates tail, barred any estate tail that Amanda had in the devised lots of land. Afterward the title of Amanda, freed from any entail, was sold by her husband and herself as a fee simple and ultimately purchased by the P. Ft. W. & C. Ry. Co.

Amanda had several children by her husband, Samuel Haight; but they all died, without leaving issue surviving and before the death of Amanda. Amanda died September 28th, 1891. Her husband had died previously.

The litigation of which this suit is part began by an action of ejectment against the same defendants, in the Common Pleas No. 2 of Allegheny county, Pennsylvania, in 1893, by S. Duffield Mitchell, administrator d. b. n. of the last will and testament of James S. Stevenson, deceased. In that case the administrator who, under the law of Pennsylvania, could maintain such an action, made precisely the same claim of title as is now urged by the present plaintiffs, and the question was fought out on the construction of the will of James S. Stevenson.

The Common Pleas Court held that the plaintiff had no title, and that the Pittsburgh, Ft. Wayne and Chicago Railway Company had an indefeasible estate in fee simple, but thought that, under the will, Amanda took an estate tail, which subsequently, properly barred, became a fee simple.

The plaintiff then sued out a writ of error to the Supreme Court of Pennsylvania, and again urged the same construction of the will which is now urged by the present plaintiff.

The result was (165 *Pa. St.*, 646), that court also held the plaintiff had no title, and the Pittsburgh, Ft. Wayne and Chicago Railway Company had an indefeasible estate in fee simple, but thought that, under the will, Amanda took an

estate in fee, and the event upon which the limitation over was based must, under the settled rule of property in Pennsylvania, have happened during the lifetime of the testator, and not having so happened the limitation over fell.

Thus, both the courts in Pennsylvania—the one of original jurisdiction, and the one of appellate jurisdiction—and the highest court in the State—unite in the result that on precisely the same material facts now and here in evidence, the Pittsburgh, Ft. Wayne and Chicago Railway Company has an estate in fee simple, and the persons claiming as the

"heirs of John Barber"

have no right, title or claim whatever to any portion of the property.

Defeated in the State court the heirs of John Barber seek a new jurisdiction in this way:

S. Duffield Mitchell, administrator, in bringing his action in the State court, represented all of John Barber's heirs, and if he had succeeded, he, as administrator, would have sold the land and distributed it among John Barber's heirs. Some of these heirs are citizens of States other than Pennsylvania, and after the decision of the Pennsylvania court they elect to take the proceeds as realty, and thus gain a footing for the jurisdiction of the Circuit Court of the United States.

They then brought this action in the Circuit Court of the United States, claiming on the identical grounds they claimed in the State court against the same defendants, and for the same property.

That court, like the State court, reached the conclusion that the heirs of John Barber had no title whatever to any of

the land, but that the Pittsburgh, Ft. Wayne and Chicago Railway Company had an estate in fee simple in the same. It also held that being an action in ejectment the decision in Pennsylvania was not conclusive on it, and that court inclined to the opinion that Amanda's estate, under the will, was a fee tail, enlarged into a fee simple, but whether that was or was not the technical construction of the will, yet, under any admissible construction of it, the heirs of John Barber had no right or title to the land, but the Pittsburgh, Ft. Wayne and Chicago Railway Company had an estate in fee simple in the same.

On a judgment entered for the defendants the plaintiff sued out a writ of error to the Circuit Court of Appeals for the Third Circuit, and after argument that court certified to this court the following questions:

(1.) Is the decision of the Supreme Court of Pennsylvania before referred to conclusive?

If not, then,

(2.) What estate did Amanda Stephens take under the devise?

We respectfully urge that the first of these questions should be answered in the *affirmative.*

That the second of these questions should be answered thus:

Amanda Stephens, under the devise, took directly or indirectly an absolute fee simple estate.

(*a*) A fee simple, with a limitation over by way of substitution to the heirs of John Barber

if Amanda died unmarried in the testator's lifetime, or if married died without offspring by her husband. Neither of these contingencies happened, and her estate on testator's death was a fee simple absolute.

(*b*) A fee tail which was subsequently barred and became a fee simple.

As the Circuit Court said, it is now immaterial which construction is technically accurate, for either defeats the plaintiffs' claim to title, and these two constructions are the only permissible ones of Mr. Stevenson's will.

The plaintiffs are children and grandchildren of John Barber, deceased. Their claim is that Amanda Stephens, under the above will, took an estate in fee in the devised lots of land, which fee, by the devise over to the heirs of John Barber, was qualified or made defeasible in the event of her dying without offspring by her husband, and as this event has happened, as they allege, even though they admit Amanda had offspring by her husband, the devise over to the heirs of John Barber has taken effect.

(1.) The decision of the Supreme Court of Pennsylvania, holding that under the long settled rule

of property in Pennsylvania, the heirs of John Barber had no title to the property in dispute, is conclusive in the Federal Courts.

The proper construction of this will, under the law of Pennsylvania, has been decided by the highest court of the State in the case of Mitchell, Administrator, vs. The Pittsburgh, Fort Wayne and Chicago Railway Company *et al*, 165 *Pa.*, 645. (Record page 7.)

That court held that, under the first clause of the will above quoted, Amanda took an absolute estate, and that the limitation over in the second clause of the devise was substitutionary in character, to take effect only upon Amanda dying in the lifetime of the testator. And inasmuch as she survived the testator any operation of the substitutionary clause forever became impossible.

The Circuit Court below held that because a single verdict and judgment in ejectment in Pennsylvania is not conclusive upon the parties, this decision of the Supreme Court of the State construing the will is not conclusive in a second action in the Federal Courts, though, as a precedent, it is entitled to peculiar regard. While it is true that a single verdict and judgment in ejectment is not conclusive upon the parties in Pennsylvania, yet this decision of the Supreme Court of the State, declaring the law of this will, we respectfully submit *is* conclusive. In a second ejectment brought in the lower courts of the State this decision of the Supreme Court would be absolutely binding upon the proper legal interpretation of the will. It is true, that upon a second appeal to the Supreme Court, that court might overrule its previous decision, as it might overrule any former decision, but, yet, so long as

the decision remained, it would give the law of the State absolutely binding upon the parties, and upon all subordinate tribunals in the State and upon the Judges of the Supreme Court. Undoubtedly, it was the law of the State, the law of this particular will, at the time this case was presented to the Circuit Court below, and must so remain the law until overruled by the Supreme Court of the State.

That the construction of a will, given by the highest court of the State, will be accepted by the Federal courts, was held by this court in Henderson vs. Griffin, 5 *Peters*, 151. In the case cited, the land in dispute had been devised by the will of Henry Laurens to Mrs. Ramsey and Dr. Ramsey, "to hold the same to them and their heirs in trust, for the use and behoof of his granddaughter, Frances Eleanor Laurens, during her life," etc.

The Supreme Court of South Carolina had held that this clause of the will created only a dry trust in Mr. and Mrs. Ramsey, and that, under the statute of uses, the whole legal and equitable title had vested immediately in Frances Eleanor Laurens, and that Mr. and Mrs. Ramsey had no title, either legal or equitable, upon which to sustain ejectment. In a subsequent ejectment in the Federal Court, brought by Frances Eleanor Laurens, intermarried then with Francis Henderson, the case was made to turn upon the effect to be given to this previous decision of the highest court of the State, construing the will of Mr. Laurens. This court said:

> "The opinion of the court (referring to the Supreme Court of South Carolina), in the case of Kennedy vs. Marsh, was an able and deliberate one; it was a judicial construction of the will of Mr. Laurens, according to their view of the rules of the common law in that state as a rule of property, and comes within the principle adopted by this court in Jackson vs. Chew, 12 *Wheaton*, 153, 167, that such

of property in Pennsylvania, the heirs of John Barber had no title to the property in dispute, is conclusive in the Federal Courts.

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> decisions are entitled to the same respect as those which are given on the construction of local statutes. * * * * * * This decided opinion of the highest court of South Carolina renders it unnecessary for this court to express their own opinion on this will."

The court then holds that the plaintiff in the case could not recover, and says :

> "These are the views which inevitably result from the local laws expounded by the highest court in the state."

In South Carolina, as in Pennsylvania, a single verdict and judgment in ejectment is not conclusive upon the parties, yet, in this case, this court held that the legal construction of a will by the application of the local law of the state thereto by the highest court in the state, is conclusive upon the Federal courts. In the case at bar, as in the case cited, we have a judicial construction of the will, by the highest court of the state, according to their views of the rules of the common law in that state, as a rule of property, and, so,

> "it comes within the principle adopted by this court in Jackson vs. Chew, that such decisions are entitled to the same respect as those that are given on the construction of local statutes,"

and furnishes us with the law of the will, by which the rights of the parties are to be determined.

In Suydam vs. Williamson, 24 *Howard*, 427, the defendant in ejectment claimed title under a purchaser at a sale of the property had under decree of foreclosure of a mortgage by the Court of Chancery in New York. The plaintiff claimed under a devise in the will of an ancestor in the title, by which devise a certain trust had been created. The title depended upon the validity of the foreclosure proceedings as against the terms of the trust created by the will. The Court

of Appeals of New York had decided in favor of the title under the foreclosure in Cochran vs. Van Surley, 20 *Wendell*, 265. Subsequent to this decision of the State Court several suits involving the same question were brought to this court: Williamson vs. Berry, 8 *Howard*, 495; Williams vs. the Irish Presbyterian Church, 8 *Howard*, 565; and Williamson vs. Ball, 8 *Howard*, 566. In each of these cases this court decided contrary to the said decision, and supported the title under the trust in the will as against the title claimed under the foreclosure. Subsequent to the decisions of this court in 8 *Howard*, the Court of Appeals in New York rendered a decision upon the same title, adhering to its previous decision in Cochran vs. Van Surley, holding that, as between the judgments of their own courts and those of the courts of the United States, their own are binding where there is a conflict except in cases arising under the constitution and laws of the United States, when the judgments of the Supreme Court of the United States are controlling authorities. The question presented to this court in the case cited in 24 *Howard*, was whether they should adhere to their own opinion as expressed in the cases in 8 *Howard*, or acknowledge the authority of the courts of New York to decide the validity of the title. Upon this question this court yielded to the courts of the state, abandoning their previous determination, upon the ground as stated in the opinion:

> "The subject of the dispute is real property situated within the State of New York, and her laws exclusively govern in respect to the rights of the parties, the modes of the transfer, and the solemnities which should accompany them. *Communis et recta sententia est, in rebus immobilibus servandum esse jus loci in quo bona sunt sita.* Every sovereign has the exclusive right to command within his territory; and the laws which originate rights to real property are commands addressed to the members of the state, requiring them to abstain from any inter-

> ference with the proprietary right they recognize or establish; and in respect to this subject the sovereignty of New York has not been impaired by her adoption of the Federal Constitution. The power to establish Federal courts, and to endow them with a jurisdiction to determine controversies between certain parties, affords no pretext for abrogating any established law of property, or for removing any obligation of her citizens to submit to the rule of the local sovereign. The title of the devisees of Mary Clarke was divested by authority conferred by the legislature of the state, which was exercised subject to the oversight of her own tribunals. The persons affected by this authority were natives of the state—children under the superintending care of the parental jurisdiction of the state. It was in the constitutional exercise of this supreme and exclusive jurisdiction that this title was disturbed. It behooves every other state to enforce or maintain rights which have thus originated in laws operating within their legitimate sphere, and which defeat no policy of their own; and the jurisprudence of this court attests the care with which this court has observed the general obligation (of which this is a particular instance), in its administration throughout the Union.
>
> "* * * * * But in the present case there is no room for doubt as to what the settled opinion of the courts of New York is in reference to this title and therefore no occasion for any hesitation concerning the obligation we have to perform. The Circuit Court decided adversely to the defendant Its judgment is reversed, and the cause remanded for further proceedings."

In Beauregard vs. New Orleans, 18 *Howard*, 497, this court said:

> "The constitution of this court requires it to follow the laws of the several states wherever they properly apply; and the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state, especially when applied to the title to lands. Upon cases like the present, the relations of the courts of the United States to a state is the same as that of her own tribunals. They administer the laws of the state, and to fulfill that duty they must find

> them as they exist in the habits of the people, and in the exposition of their constituted authorities. Without this, the pecular organization of the judicial tribunals of the states and the Union would be productive of the greatest mischief and confusion."

In Miles vs. Caldwell, 2 *Wallace*, 43, Mr. Justice Miller, delivering the opinion said:

> "We remark that it is the settled doctrine of this court in reference to all questions affecting the title to real estate, to permit the different States of the Union to settle them each for itself; and when the point involved is one which becomes a rule of property we follow the decisions of the state courts, whether founded on the statutes of the states or their views of general policy."

Daly's Lessee vs. James, 8 *Wheaton*, 495, was an action of ejectment by the plaintiffs in error to recover the possession of a lot in the city of Philadelphia. The title depended upon the construction to be given to the will of John Bleakley. Mr. Justice Washington, after referring to the difference of opinion among the judges of this court as to the proper construction to be given to the will, says:

> "Upon a question of so much doubt this court, which always listens with respect to the adjudications of the courts of the different states, where they apply, is disposed upon this point to acquiesce in the decisions of the Supreme Court of Pennsylvania, in the case of Smith's Lessee vs. Folwell, 1 *Bin.*, 546, that the word heirs is to be construed to be a word of limitation, and, consequently, that the devise to the brothers and sisters failed to take effect by their deaths in the lifetime of the son."

In Jackson vs. Chew, 12 *Wheaton*, 153, the title depended upon the proper construction of the will of Medcef Eden, as to whether or not the language used created an estate tail in the first taker, or an executory devise, taking effect upon the

definite failure of issue. Mr. Justice Thompson, in giving opinion of this court, said:

> "Questions growing out of devises of this description are among the most difficult and intricate doctrines of the law; and from the numerous cases that have arisen, as found reported in the books, it will be seen that nice and almost imperceptible distinctions have been resorted to, with the avowed object of carrying into effect the intention of the testator. To review the cases that have arisen in the English courts on these questions would be an arduous and, to reconcile them, a difficult if not a fruitless undertaking. Nor are the decisions of the state courts in our own country in perfect harmony with each other. It is not deemed necessary, however, in the present case, to enter into an examination of these various decisions, either for the purpose of attempting to reconcile them, or to extract from them principles which might be applicable to the case now before the court if the question was considered entirely an open question. The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court that would be applied by the state tribunals."
>
> "This is a principle so obviously just, and so indispensably necessary, under our system of government, that it cannot be lost sight of."

This court then refers to two decisions in the State of New York, construing the will in question, and says:

> "After such a settled course of decisions, and two of them in the highest court of law in the state, upon the very clause in the will now under consideration, deciding that Joseph Eden did not take an estate tail, a contrary decision by this court would present a conflict between the state courts and those of the United States, productive of incalculable mischief. If, after such an uninterrupted series of decisions for twenty years, this question is not at rest in New York, it is difficult to say when any question can be so considered. And it will be seen

by reference to the decisions of this court, that, to establish a contrary doctrine here would be repugnant to the principles which have always governed this court in like cases.

"It has been urged, however, at the bar, that this court applies this principle only to state constructions of their own statutes. It is true that many of the cases in which this court has deemed itself bound to conform to state decisions have arisen on the construction of statutes. But the same rule has been extended to other cases; and there can be no good reason assigned why it should not be, when it is applying settled rules of real property. This court adopts the states decisions, because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law as the statute law of the state when applied to the title of lands. And such a course is indispensable in order to preserve uniformity; otherwise, the peculiar construction of the judicial tribunals of the states and of the United States would be productive of the greatest mischief and confusion." * * * * * * "And the case of Daly vs. James, 8 *W.*, 535, which arose in Pennsylvania, is directly in point. The question there was upon the interpretation of a clause in a will, which had received a judicial construction by the Supreme Court of that state. And it was urged, as it has been here, that it was not one of those cases where the decisions of state courts, on questions of local law, established rules of property which this court could not disturb. But the court said they always listened with respect to the adjudications of the different states when they apply. And in a question of so much doubt they were disposed, upon this point, to acquiesce in the decision of the Supreme Court of that state, Smith vs. Folwell, 1 *Binn.*, 546, that the word 'heirs' in the will is to be construed to be a word of limitation.

"In that case this court adopted a single decision of the state court upon the question. But, in the case now under consideration, there have been two decisions, in the two highest courts of law in the state, upon the identical question now in judgment, and which were in conformity to a settled course of adjudications for twenty years past."

In Lane vs. Vick, 3 *Howard*, 464, this court had before it for construction the will of Newit Vick, in a controversy between parties claiming under the will. The will had previously been before the Supreme Court of Mississippi, where the land lay, in a contest between the town of Vicksburg and some heirs of the testator, which litigation involved the question as to whether or not certain lands claimed by the town had been dedicated to public use by a clause of the will, and in this way a partial construction of the will became incidental to the litigation. The construction then placed upon the will by the Supreme Court of Mississippi was urged upon this court as conclusive. To this contention Mr. Justice McLean says:

> "The parties in that case, (the Mississippi case), were not the same as those now before this court, and that decision does not affect the interests of the complainants here. The question before the Mississippi court was, whether certain grounds within the town plat had been dedicated to public use. The construction of the will was incidental to the main object of the suit, and, of course, was not binding on any one claiming under the will. With the greatest respect, it may be proper to say that this court does not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes.
>
> "Where, as in the case of Jackson vs. Chew, 12 *Wheat.*, 167, the construction of a will had been settled by the highest courts of the state, and had long been acquiesced in as a rule of property, this court would follow it, because it had become a rule of property. The construction of a statute by the Supreme Court of a state is followed, without reference to the interests it may affect, or the parties to the suit in which its construction was involved. But the mere construction of a will by a state court does not, as the construction of a statute of a state, constitute a rule of decision for the courts of the United States. In the case of Swift vs. Tyson, 16 *Pet.*, 1, the effect of the thirty-fourth section of the judiciary act of 1789, and the construction of instru-

> ments by the state courts, are considered with greater precision than is found in some of the preceding cases on the same subject."

In that case it will be seem that the construction of the will given by the state court had not been upon the title of the several devisees claiming under the will, and had not settled the title of the claimants then before this court, yet even, differing from the opinion of the state court under such circumstances, encountered the strong dissent of Chief Justice Taney and Mr. Justice McKinley, the latter in his opinion saying :

> "And when Congress defined the powers of the courts of the United States they directed that the laws of the several states should be regarded as the rule of decision in suits at common law in cases where they apply. And upon these principles, with few, if any, exceptions, has this court acted from the commencement of the government down to the present term of this court. That they should continue so to act is of great importance to the peace and harmony of the people of the United States. If the state judicial tribunals establish a rule governing titles to real estate, whether it arise under statute, deed or will, and this court establishes another and a different rule, which of these two rules shall prevail? They do not operate like two equal powers in physics, one neutralizing the other; but they produce a contest for success, a struggle for victory; and in such a contest it may easily be foreseen which will prevail.
>
> "The state courts have unlimited jurisdiction over all the persons and property, real and personal, within the limits of the state. And as often as the courts of the United States have it in their power, by their judgments, under their limited jurisdiction, to turn out of the possession of real estate those who have been put into it by the judgment of the highest court of appellate jurisdiction of the state, so often that possession will be restored by the same judicial state power. To avert such a contest, and in obedience to the act of Congress before referred to, this court have laid it down in many cases, as a sound

and necessary rule, that they should follow the state decisions establishing rules and regulating titles to real estate. And in the following cases they have applied the rule to the construction of wills devising real estate. In Jackson vs. Chew, 12 *Wheat.*, 162, the principle is fully maintained. In that case the court say :

> 'The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court that would be established by the state tribunals. This is a principle so obviously just, and so indispensably necessary under our system of government, that it cannot be lost sight of.'

"The question in that case arose upon the construction of a will devising land in New York. In the case of Henderson and wife vs. Griffin, 5 *Pet.*, 154, the court say :

> 'The opinion of the court in the case of Kennedy vs. Marsh was an able one ; it was the judicial construction of the will of Mr. Laurens, according to their views of the rules of the common law in that state, as a rule of property, and comes within the principle adopted in Jackson vs. Chew, 12 *Wheat.*, 153, 167.'

"These cases are in strict conformity with the 34th section of the Act of the 24th September, 1789, above referred to.

"There are many other decisions of this court applicable to this case ; some of them have followed a single decision of a state court, where it settled a rule of real property. And at the present term of this court, in the case of Carroll vs. Stafford, treasurer, etc., 3 *How.*, 441, it was held that it was not material whether it had been settled by frequent decisions, or a single case. From these authorities it is plain, the jurisdiction of this court is not wholly concurrent in this case with the Supreme Court of Mississippi ; but in power of judgment it is subordinate to that court, and, therefore, the construction given by that court to the will ought to have been the rule of construction for this court."

In the case referred to by Mr. Justice McLean, of Swift vs. Tyson, 16 *Peters*, 1, the meaning of the word "laws" of the several states in the 34th section of the judiciary act was considered, and it was there held as follows:

> "In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local; that is to say to the positive statutes of the state and the construction thereof adopted by the local tribunals, *and to rights and titles to things having a permanent locality, such as the rights and titles to real estate*, and other matters immovable and intraterritorial in their nature and character."

But in this case we have the decision of the highest court of Pennsylvania directly upon the question as to the right and title of the respective litigants herein to the real estate situated in the State of Pennsylvania and wholly subject to its jurisdiction.

The Mississippi case that Mr. Justice McLean did not feel bound to follow did not settle the right and title of the respective litigants in this court to the property in dispute, but, as Mr. Justice McLean says, the Mississippi decision

> "Was not binding on anyone claiming under the will."

We respectfully submit, that where the highest court of the state has settled the title of the respective parties to the land within the state its decision should be respected in order to avoid the evils suggested by Mr. Justice McKinley.

The plaintiffs, however, seek to evade the effect of the state decision by the facts which they themselves have set forth in

their amendment to paragraph second of the certificate (record page 4), as follows:

> "That, on the 16th day of October, 1831, when confined to his room by sickness, and after a dangerous illness for two weeks preceding his death, the testator, though he had theretofore signed his will, first published the same in the presence of witnesses whom he called to attest it, and a few hours thereafter died, and this will, on the 18th of October, 1831, was duly probated, which facts as to the time and circumstances of publication were not found by the special verdict on which judgment was entered in the ejectment suit in the State courts of Pennsylvania."

It is true that the fact herein referred to was not found by *the special verdict* rendered in the state court, but in addition to the facts found by the special verdict there was testimony offered in the state court by the plaintiff, and, among other things, a certified copy of the will was offered to which was attached the Register's record of probate, from which, and from which alone, the facts referred to have been found. The will, with the record of probate, was printed by the appellant in his paper book in the Supreme Court of the state. So that these facts were fully before the state court by the only evidence upon which they have been found to exist. This is apparent from the opinion of Judge Ewing (Record, page 4), wherein he says:

> "The question of law arises on the construction of the will of James S. Stevenson, who died October 16, 1831, aged 51 years, having a few hours before his death made his last will, dated, however, March 12, 1841, written by himself. The original will is without punctuation. *The facts as to its excution appear from the probate endorsed on the will.*"

And what are the facts that thus appear from the probate endorsed on the will, is rendered apparent from the opinion of Judge Acheson (Record, page 10), wherein it is said:

> "Then they (the plaintiffs) have offered the Register's record of the probate of the will, which sets forth that the two attesting witnesses deposed before him that on the 16th day of October, 1831, the date of Stevenson's death, as appears *aliunde*, they subscribed their names to the will as witnesses, at the request and in the presence of the testator, who then declared that it was his last will and testament."

So the state court had before it, in the language of Judge Ewing,

> "the facts as to its execution from the probate endorsed on the will,"

and what those facts were we discover from the findings of Judge Acheson, who tried the case in the court below without the intervention of a jury.

The state court then had before it the fact, that a few hours before the death of the testator he published his will in the presence of witnesses, whom he called to attest it.

But the facts thus appearing as to publication are wholly irrelevant as bearing upon the construction of the will. The testator himself stated in the introductory part of his will,

> "I, * * * do hereby declare this writing to be my last will and testament, *made this 12th day of March*, in the year of our Lord 1831."

At the conclusion of the will he states that he signed it

> "at Pittsburgh, this 11th day of March 1831."

These statements of the will itself are the only evidence as to the time the will was actually made. Publication is not necessary to the validity of a will in Pennsylvania. Unquestionably, under the law of Pennsylvania, this paper

would have been the testator's will had witnesses never subscribed it, and had it never been published by the testator himself. *Brightly's Purdon's Digest*, vol. 2, page 2102, par. 7, 12th Ed.

Rossetter vs. Simmons, 6 *Sergeant & Rawle*, 452.
Carson's Appeal, 59 *Penn'a St.*, 456.
Frew vs. Clarke, 80 *Penn'a St.*, 170.

The action of the testator, therefore, in calling witnesses to attest his will shortly before his death, means no more than saying to his friends,

> "This is my will. It was my will on the 12th of March, 1831, and that it was and is, so I wish you to attest by subscribing your names as witnesses of my signature."

Certainly, this can have no relevancy whatever to the proper construction of the language he used in the will, when we know that the language was so used on the 12th of March, 1831, when, as recited in the will itself, he was only 50 years of age, with every reasonable prospect of a long life before him.

It can have no bearing upon the construction of the will at any rate. As is said by this court in Allen's Executors vs. Allen, 18 *Howard*, 385,

> "That the court may put itself in the place of the testator, by looking into the state of his property and the circumstances by which he was surrounded when he made the will, is not only true as a general proposition, but without such information it must often happen that the will could not be sensibly construed. Such evidence, however, is only admissible to explain ambiguities arising *out of intrinsic circumstances* as to persons provided for, objects of disposition and the like. For instance, if the testator

> gave to his grandson, J. S., a plantation, and he had two grandsons of that name; or he devised his son J. his plantation on a certain river, and he had two plantations there—in each case proof might be heard to show the person or thing intended. But evidence cannot be heard to show a different intention in the testator from that which the will discloses."

In our case there is no ambiguity about persons or property intended. There is no ambiguity arising whatever in circumstances extrinsic the will. The sole difficulty is in determining what effect in law shall be given to the words the testator has used. And as said by this court in King vs. Ackerman, 3 *Black*, 408:

> "A court may look beyond the face of the will, where there is an ambiguity as to the person or property to which it is applicable, but no case can be found where such testimony has been introduced *to enlarge or diminish the estate devised.*"

The plaintiffs seek to look at these extrinsic circumstances for the purpose of diminishing the estate that Amanda Stevens took under the testator's will, not for the purpose of identifying her or the property devised, or the disposition intended, but to reduce her absolute estate to one uncertain, contingent and practically, no more than an estate for life. Surely titles to property ought not to be made to depend upon evidence of such circumstances, and thereby charge an intending purchaser with the collection of the evidence of such events more than half a century after their happening. It is of the highest importance to the security of titles and the transfer of the same that the language of the will—and that language alone—should be looked to to determine the nature of the title to be conveyed, otherwise conveyancing would be an exceedingly dangerous business, and the transfer of titles be fettered by the uncertainty accompanying every such transaction.

In view of the criticism of the conduct of the Supreme Court made by plaintiffs, we deem it only proper to state that the court, at the argument of the case, suspended its rules, and specially allowed the appellant twice the length of time permitted for oral argument by those rules. If the appellant failed, as he now alleges, to argue the point in his case it was surely not the fault of the court. In answer to a similar complaint of counsel in Cross vs. Allen, 141 *U. S.*, 538, this court said:

> "It is said, however, that the cases just cited (certain state decisions) were decided without having been fully argued and without mature consideration of this question, upon the mistaken assumption that it had been previously decided, and therefore they have not become a rule of property in the state and are not binding upon the court. We are not impressed with this contention. Such argument might with propriety be addressed to the Supreme Court of the state, but it is without favor here. *We are bound to presume that when the question arose in the state court it was thoroughly considered by that tribunal, and that the decision rendered embodied its deliberate judgment thereon.*"

It is a settled rule of property in Pennsylvania construing wills that the happening of the event on a limitation over as in Mr. Stevenson's will is restricted to the lifetime of the testator. Admittedly the event on what John Barber heirs would take did not happen in Mr. Stevenson's lifetime.

The decision of the Supreme Court of the state, confirming the title of the defendant under this will, was made in application of the Pennsylvania rule of property, which in

Stevenson vs. Fox, 125 *Pa.*, 568, was stated and appproved by the Supreme Court of the state in the following language:

> "In a devise to A in fee, followed by a proviso that if A should die without leaving issue surviving him, then to B, the testator means the death of A within the period of the testators's own life, with the result that A, surviving the testator, takes a fee without any other condition or limitation, and that B takes nothing."

The rule was announced in the jurisprudence of Pennsylvania in the case of Caldwell vs. Skilton, 13 *Pa.*, 152. In that case the devise was to the wife during life, or her widowhood, and at her death or marriage the estate was to descend to and be enjoyed by the testator's children, to have and to hold, share and share alike, as tenants in common; and *in case of the death* of either of said children, his or her share or purpart to descend to the children of such child, *or if said child shall die without issue born alive*, then said share to be divided among the surviving children, share and share alike, as tenants in common.

It will be noticed that in this will we have an instance of both the cases referred to in Britton vs. Thornton. We have the case of the death of either of said children, not coupled with any additional circumstances really making such an event contingent; and we also have this most certain of events coupled with the contingency of its happening—

> "without issue born alive,"

which really makes it contingent; so the case gave occasion for the consideration of both such features.

The wife, to whom the property was given for life, or widowhood, died during the life of the testator. The Supreme Court of Pennsylvania held that each of the children surviving, on the death of the testator, took an

indefeasible estate in fee simple under the will. That by the clause,

> "In the case of the death of either of my said children,"

as also, by the clause,

> "or, if said child should die without issue born alive,"

the testator did not mean death generally, or when it might happen, but meant, (his wife having died during his lifetime,) that the fee should vest absolutely on his death, and that it was indefeasible throughout the entire life of the children.

As to the first clause,

> "In the case of the death of either of my said children,"

where the death is not coupled with any circumstances making it really contingent, the court said:

> "The cases collected by Mr. Powell, in the 27th chapter of his *Treatise on Devises*, abundantly show that where there is nothing to indicate an adverse intent, additional limitations, dependent on no other contingency than is implied from the language, 'if any of them die,' or 'in case of death,' cannot be referred to the event of death whenever it might happen, (which would be to give a forced signification to such words;) but must be construed as referring to death in association with some additional circumstance which makes it *actually* contingent. That circumstance, it is said, is naturally in regard to the time of its happening, and that time, where the gift is *immediate*, is necessarily the death of the testator, there being no other period to which the death can be referred. But, as the testator is not supposed to anticipate himself surviving the object of his bounty, this construction is only made from necessity, and gives way where the contingency of the death of the first beneficiaries may be referred to some other time, which is always the case where the gift is limited to take effect at some period subsequently to the testator's death;

> as where there is a precedent particular interest carved out of the fund or estate. These rules are applicable, whether the *corpus* of the gift be personalty or realty, where the whole interest on each is given subject to be defeated by the implied contingency."

As to the construction of the second clause:

> "Or if said child should die without issue born alive,"

where the death is coupled with a circumstance making it really contingent, the court said:

> "Here the ultimate gift to the survivors is made to depend upon an actual contingency. Where, say the determinations, this is the case, and there is nothing in the will to show the contingency of dying without children was meant to operate without limit, during the life of the first taker, it is as in the other instance restricted to the death of the testator, or within a given period after his decease. Where the gift is immediate, the contingency is held determined by the first named event; where there is an intermediate estate, time may be given for the happening of the possibility during the running of the precedent interest."

So we have a clear ruling that the clause of the will:

> "Or if said child shall die without issue born alive,"

must be held to mean, dying without issue born alive during the lifetime of the testator.

The rule as thus announced for the construction of such provisions remains to this day the law of Pennsylvania, and is thoroughly imbedded in our jurisprudence as a rule of property upon which hundreds of titles depend. Applying this rule to our will, undoubtedly, the testator when he uses the words :

> "in the event of Amanda dying * * * without offspring by her husband,"

intended such death as happening before his own ; the gift is immediate ; there is no precedent particular interest created. The gift over is made to depend upon an actual contingency, and there is nothing in the will to show the contingency of dying without offspring by her husband was meant to operate without limit during the life of the first taker, and such being the case, in the language of the court, it is, as in the other instance, (death uncoupled with any circumstances making it really contingent), restricted to death of testator.

This rule has been followed ever since, both as to devises of real estate and bequests of personal property, there being no distinction in Pennsylvania between realty and personalty in this respect.

In the estate of Mary Biddle, 28 *Pa.*, 59, the will under consideration was as follows :

> "I give to my daughter Ann everything of which I die possessed. In the event of my daughter's death without children I give and devise to Doctor John S. Biddle, George W. Biddle and Captain Biddle each two thousand dollars."

Held that the estate vested in Ann was absolute, subject to go over only in the event of Ann dying before the death of the testator.

In Schoonmaker vs. Stockton, 37 *Pa. St.*, 461, the devise was to the children of the testator in certain interests, with the following proviso :

> "Should any of my dear children die unmarried, or without issue, then the legacy here left him or her or them is to revert to the general estate," &c.

And in answer to some suggestions of the appellant's counsel, we wish to call the attention of the court particularly to the fact that in this case the will was probated before the Pennsylvania wills act of 1833, the subject of it is the devise of real estate, and the language of the devise *did not mention heirs, or express a fee.* The court, however, held that it was a devise of a fee by implication, and said:

> "We cannot read the clause, providing for a reversion in the case of a child dying unmarried or without issue, as affecting this interpretation. We suppose it was intended, not to reduce or defeat any estate vested in enjoyment under the will, but to dispose of any that might fail to become thus vested by the death of a child before the testator, or perhaps before actual distribution. * * * * It is hardly supposable that it was intended to provide for the death of a child, it might be the last surviving one, a quarter or a half a century after the testator's own death."

It will be noted that the language in this case coupled the death with circumstances making it really contingent, viz:

> "Should any of my dear children die unmarried, or without issue,"

either of two actual contingencies—marriage, or, if married, without issue. Notwithstanding this the rule in Caldwell vs. Skilton was applied, and the happening of the contingency held to be

> "restricted to the death of the testator."

It will also be noticed that the language of the will is the precise equivalent of the language in our will:

> "Should any of my dear children die unmarried, or without issue, then, &c."

is certainly the precise equivalent, as near as words can be equivalent, to

> "In the event of Amanda dying unmarried, or, if married, dying without offspring, then, &c."

So in the case cited, as in the cast at bar, we have a will made and probated previous to the Pennsylvania Wills Act of 1833, not expressing a devise in fee, or to heirs, and the gift over made to depend upon an actual contingency, viz., death without marriage, or without issue, just as in our case, and the happening of the contingency held to be confined to the lifetime of the testator. This decision has been cited and approved by the Supreme Court of Pennsylvania numerous times since it was made, and has never been restricted, or qualified, and furnishes us with a full and precise precedent for the decision of the Supreme Court upon the will in this case.

In Shutt vs. Rambo, 57 *Pa.*, 149, the testator devised to his daughter a farm "in fee," and gave other real estate in fee to other children. The concluding clause of his will was as follows:

> "It is my will that should any of my children die without heirs, then the property hereby bequeathed to them shall revert to my estate."

The Supreme Court of Pennsylvania, by Chief Justice Thompson, said:

> "It will be observed that there is no devise over in default of 'heirs' (evidently meaning 'issue'), but only that the estate devised should fall back into the testator's estate. In that event, by clause 25th, it would have to be sold by the executors and the proceeds distributed among the testator's children. It is inconceivable that the testator meant to keep up administration indefinitely, almost, for such a purpose, or intended to make every bequest and devise to his children or friends contingent by this clause, when he had used clear words indicating the contrary. With a general intent so distinctly evinced, I think we should regard the provision as a similar provision was regarded in

Schoonmaker vs. Stockton, 1 *Wright*, 461, as having reference to the death of any of the devisees in the lifetime of the testator. It may have effect in that way, but in no other, without thwarting the general intent of the devisor.

"But giving the words of the twenty-fourth clause all that could possibly be claimed for them, to wit, an implication of a limitation to issue by the words 'die without heirs,' equivalent to 'dying without issue,' as in Eichelberger vs. Barnitz, 9 *Watts*, 447, and kindred cases, the devise to Emma Rambo, the plaintiff below, would be a fee tail, which by the Act of 27th of April, 1855, would be turned into a fee simple, the will bearing date 27th of May, 1857. That the word 'heirs' meant 'issue' must be inferred, in the presence of the fact that her brothers and sisters were living and would be her heirs. It must, therefore, have been 'issue' that was meant by the words. In either view of the case the plaintiff below was vested with the fee simple of the property in question, and could, for anything disclosed on this record, convey such a title to the defendant below."

Karker's Appeal, 60 *Pa.*, 141, involved the construction of the will of John Rex, Sen., who died in 1802. The provisions of the will under discussion were as follows:

"I give and devise unto my son Joseph Rex all that my messuage * * * to him, his heirs and assigns forever, etc.

"Item: In case my son Joseph, who is now in a declining state of health, shall happen to die intestate and without issue, then and in such case I give, bequeath and devise the estate, real and personal, willed, bequeathed and devised unto him, to my son the said William Rex, and to his heirs and assigns forever."

William died in 1845, and Joseph remained in possession of the land devised to him until his death in 1859. The Supreme Court of the state held—

(*a*) That Joseph took a fee simple in the land.

(*b*) That the limitation over to William was intended to provide for the death of Joseph within the lifetime of the testator, or in the lifetime of William, and that Joseph having survived both of these events, *eo instanti* the executory devise to William was defeated, and Joseph's estate became absolute.

In Fahrney vs. Holsinger, 65 *Pa.*, 388, the devise was:

> "I give to my son Daniel and my daughter Susanna the balance of my farm at $55 per acre."

The testator directed that the proceeds of all his estate should be equally divided amongst his five children, so that those who had more than their share in their bequests should pay over to two other daughters named such sums as would equalize their shares, so that all of his children should get share and share alike. By codicil to this will it was directed:

> "That if my daughter Susanna die without heirs."

Then the part bequeathed to her shall fall to Daniel at the same rate as in the will, and be equally divided between those of my other children, or their heirs and representatives then living, to be paid as the payments are directed in my will.

Held, that the devise was a fee to Daniel and Susanna; that the heirs of Susanna referred to in the codicil meant issue, and that the contingency of Susanna's death without issue was confined to the lifetime of the testator.

In Mickley's Appeal, 92 *Pa.*, 514, the clause of the will which gave rise to the controversy was as follows:

> "I direct that if either of my sons should die without leaving issue living at the time of his death, the share given to such son shall pass to and be divided among such of my children as may be then living, and to the issue of such as may be dead, such issue, however, only taking the share of their parents."

The counsel for the appellant contended that the bequest over was a good, executory bequest, and that the contingency of death was not restricted to death in the lifetime of the testator, but being coupled with the circumstances making it really contingent, the words of the will must mean death at any time, and for such construction cited O'Mahoney vs. Burdett, 7 *Law Rep.*, and other authorities cited by this court in its opinion in Britton vs. Thornton, *supra*. On this contention Chief Justice Sharswood, delivering the opinion of the court, after referring to the argument of appellant's counsel, said :

> "He is sustained by some English cases which are not of authority with us. * * * * * * It is very clearly settled, both in England and in this state, that if a bequest be made to a person absolute in the first instance, and it is provided that in the event of death, or death without issue, another legatee or legatees shall be substituted to the share or legacy thus given, it shall be construed to mean death or death without issue before the testator. The first taker is always the first object of the testator's bounty, and his absolute estate is not to be cut down to an estate for life, or what is practically the same thing, to be subjected to an executory gift over upon the occurrence of the contingency of death or death without issue at any future period within the rule against perpetuities without clear evidence of such an intent : Caldwell vs. Skelton, 1 *Harris*, 152; Estate of Mary Biddle, 4 *Casey*, 59; Karker's Appeal, 10 *P. F. Smith*, 141 ; Fahrney vs. Holsinger, 15 *P. F. Smith*, 388 ; McCullough vs. Fenton, *Id.*, 418. In Jessup vs. Smuck, 4 *Harris*, 327, the general rule is recognized, though in that case the court, upon the construction of the whole will, thought the intention of the testator was very clear, that he meant death 'without marriage,' at a period subsequent to his own death. In the will before us it is strongly contended that death without issue living at the death of the first taker evinces the same intention. But it is not easy to draw such an inference from those

> words alone. Mr. Smith, in his work on executory interests, maintains that where the gift over is not merely dependent upon death, but upon dying unmarried and without issue, the event will be construed to mean not to death generally at some time or other, but a death in the testator's lifetime, if the fund or property itself, and not merely the interest or income, is given absolutely to the person whose death is spoken of: sec. 662. In the English cases a distinction is made between devises of realty and bequests of personalty *which has not been recognized in this state.*"

In Fitzwater's Appeal, 94 *Pa.*, 141, the testator devised and bequeathed his residuary estate in five parts, three of which were to be held in trust to pay thenet income thereof to each of his three nephews for life, and at the death of either,

> "then to pay the principal sum of the share of him so dying unto his children, should he leave any surviving him, * * * and provided, further, that should F., the son of my nephew J., die without issue, then I order and direct that the money coming to him out of my estate, at the death of his father, as hereinbefore provided, shall go to his uncles and aunt, on his father's side."

Held, that the words "die without issue" referred to the contingency of F.'s death without issue during the lifetime of J., the first taker, and that upon the death of J., F. was intitled to an absolute estate in J's share.

In the case of Stevenson vs Fox, 125 *Pa.*, 568, the court below, affirmed by the Supreme Court, said:

> "The rule of property applicable to the present case is still in force in Pennsylvania in all its ancient strictness. The relaxation made in England has not been adopted by the courts of this state, and until the legislature changes the law it must be presumed that in all devises and bequests of the character of these which appear in the wills of William and Ann Stevenson, viz. *A devise to A in fee, followed by a proviso that if A should die without leaving issue*

> *surviving him, then to B, the testator meant the death of A within the period of the testator's own life, with the result that A surviving the testator takes a fee without any other condition or limitation, and that B takes nothing.*"

The Supreme Court affirmed this in a *per curiam*, saying there was nothing upon which to hang even a doubt.

In McCormick vs. McElligott, 127 *Pa*, 230, the testator, after giving all his estate to his wife for life, devised and bequeathed the rest, residue, and remainder of his estate, after the death of his widow, to his "daughter Hannah, her heirs and assigns," but, providing, his "said daughter Hannah should die without child or children" his estate should be equally divided between his brother and sisters.

Held, in such case the words "should die without child or children," were intended to mean, die without child or children during the lifetime of the testator's widow, and the daughter Hannah, upon the death of the widow, became seized of an indefeasible estate in fee simple in the property so devised to her.

In King vs. Frick, 135 *Pa.*, 575, the provision of the will was as follows:

> "All my estate, real, personal or mixed, not bequeathed or devised to my said wife as aforesaid, I give, devise and bequeath to my said son, Harry B. King, and to his heirs and assigns forever, subject to the events and conditions aforesaid. If my said son should die without children, grandchildren, or wife living, then his portion of his estate under this will and any increase thereof, I bequeath and devise as follows: One-half thereof to my wife in fee and absolutely, and the remaining half to the next of my kindred in fee and absolutely."

The court held that the estate of Harry was absolute, subject to defeat only upon his dying without children, grandchildren or wife living, in the lifetime of the testator.

In Morrison vs. Truby, 145 *Pa.*, 540, there was a devise of realty to a son "during life, and after his death to his children and their heirs," and other realty to a daughter and her heirs, and a bequest of personalty to each of the devisees, coupled with the direction further that if either should die without leaving issue at the time of his or her death, all realty and personalty devised or bequeathed to the child so dying should go to the other absolutely.

Held, that the clause of the will relating to the death of either of the testator's children without issue did not qualify the nature of the titles to realty previously devised to them, but had reference to the contingency of such death in the testator's lifetime. Having survived the testator, the daughter took an indefeasible estate in fee simple in the realty devised to her.

> "It will be seen upon an examination of the eighth clause that it applies not only to the real estate, but also to the personal property, stocks, bonds, money, etc., bequeathed to his son and daughter. The devises and bequests are blended in the provision that, upon the death of either his son or daughter the whole would go to the survivor absolutely and in fee simple. As to personal estate, the rule of construction in such cases is well settled. In Mickley's Appeal, 92 *Pa.*, 514, Mickley, the testator bequeathed one-sixth of his estate to one of his sons, 'or his heirs,' and a like proportion in the same language to the other two sons, and the remaining three-sixths in trust for each of his three daughters. He also directed: 'If either of my sons should die without leaving issue living at the time of his death, the share given to such son shall pass to and is divided among such of my children as may be then living, and to the issue of such as may be dead.' It was held that each son had an absolute, indefeasible interest in the share bequeathed to him. The general rule was recognized that, if a bequest be made to a person absolutely in the first instance, and it is provided that in the event of death, or death without issue, another legatee or

legatees shall be substituted to the share or legacy there given, it shall be construed to mean death or death without issue before the death of the testator. To the same effect are the following cases:

Biddle's Est., 28 *Pa.*, 59;

Fitzwater's App., 94 *Pa.*, 141;

Stevenson vs. Fox, 125 *Pa.*, 568.

"We cannot believe that the testator intended the same words, applied generally to both classes of property, to have a particular effect with respect to the other; for, having blended them in this particular clause of the will the undoubted inference is that he intended this clause to be subject to the same construction as to both.

"In Mickley's Appeal, *supra*, it is said by Chief Justice Sharswood, that whilst in the English cases a distinction is made in this respect between devises of realty and bequests of personalty, *no such distinction is recognized in this state.* Indeed, Mickley's Appeal is ruled upon the authority of Caldwell vs. Skilton, 13 *Pa.*, 152, which is a case arising upon a devise of realty. In that case a testator devised real estate to his wife during life or widowhood, and at her decease or marriage the estate to descend to and be enjoyed by his children and their assigns forever, as tenants in common; and in case of the death of either of the said children his or her share or purpart to descend to the children of said child, or *if said child should die without issue born alive*, then the said share to be divided among and be enjoyed by the surviving children, their heirs and assigns forever. It was held that each of the children, on the death of the testator, took an indefeasible estate in fee simple under said will; that, by the clause, 'in case of the death of either of my said children,' the testator did not mean death generally, or whenever it might happen, but that he meant, his wife having died during his lifetime, that the fee should vest absolutely on his death, and that it was not defeasible throughout the entire life of the children. Mr. Justice Bell, upon a review of the authorities in the case just cited, concludes that where there is nothing to indicate an adverse intent, additional limitations dependent upon no other contingency than is implied from the language 'if any of them die,' or 'in case of death,' cannot be referred

> to the event of death whenever it may happen, which would be to give an enforced signification to such words, but must be construed as referring to death in association with some additional circumstances which makes it actually contingent. That circumstance, it is said, is naturally in regard to the time of its happening; and that time, where the gift is immediate, is necessarily the death of the testator, there being no other period to which the death can be referred. Caldwell vs. Skilton, was afterwards approved in Jessup vs. Smuck, 16 *Pa.*, 340."

In Coles vs. Ayres, 156 *Pa.*, 197, decided in 1893, there was a devise to the testator's children of certain lands, with the following proviso:

> "If both of my children should die intestate and without lawful heirs, then" over.

The court held that the children took a fee simple estate by implication, and as to the limitation over said:

> "We have next the words 'and without lawful heirs,' which clearly mean without issue, for the devise over is to the testator's nephews and nieces, who would be 'lawful heirs' of his children had he meant those words in their proper sense. 'But die without issue' as the contingency on which a new devisee is to take after a previous devise in fee, means die in the lifetime of the testator, and if the devisee survive the estate he takes is absolute. Mickley's Appeal, 92 *Pa.*, 514; Stevenson vs. Fox, 125 *Pa.*, 568; King vs. Frick, 135 *Pa.*, 575 And that this was the actual intent in the present case appears conclusively from the words with which the devise over are introduced, 'if etc. * * * I direct that all my estate given by this will to my children, and intended for them if they should live, shall,' etc. If they should live till when? Certainly till the will becomes operative by the death of the testator. No other period can reasonably be assigned as that which the testator had in contemplation.
>
> "This construction is in entire harmony with such of our cases as are closely analogous, especially Karker's Appeal, 60 *Pa.*, 141, and Edwards vs. Barnard, 84 *Pa.*, 184. These two cases would gov-

> ern the present absolutely but for the fact that in both of them the will gave a fee expressly, and the decision therefore was complicated partly with the rule that repugnant conditions subsequent cannot be attached to a fee. But on the main questions raised there is no difference between a fee expressly given and a fee presumed by the statute. The latter as well as the former can only be defeated by a subsequent provision which shows clearly that the testator intended not to give a fee, though he used language which, standing alone, would have been effective for that purpose. No such intent can be fairly gathered from the present will, and therefore the fee given by item ten is unaffected by the subsequent clause."

These decisions unite in defining the settled rule of property in Pennsylvania to be that, where the devise and the limitation over are, as in Mr. Stevenson's will, the happening of the condition is restricted to the lifetime of the testator, and John Barber's heirs took no title because the condition subject to which Amanda took did not happen in testator's lifetime.

For the Federal Courts to reverse that rule, and adopt another rule of property for Pennsylvania, would be to depart from their settled policy of following the rules of property in each state, and would establish two rules for the same title—one good only in the state court, and one good only in the federal courts. The title would, in the end, depend on where the citizen lived who held it.

The plaintiffs rely upon the decision of this court in the case of Britton vs. Thornton, 112 *U. S.*, 526, as in conflict with and overruling this settled Pennsylvania rule of property, but they overlook the fact that in that case the Supreme Court of Pennsylvania had twice theretofore considered and

passed upon the same will, and this court followed that construction. That each time the Pennsylvania Court held that, owing to the peculiar language of Joseph Thornton's will, the devise over of the portion of Eliza Ann Thornton,

> "Provided, that should the said Eliza Ann die in her minority and without lawful issue then living, the land hereby devised shall revert and become a part of the residue of my estate hereinafter disposed of,"

was not restricted to the lifetime of the testator, Joseph Thornton. That, as Eliza Ann died under twenty-one (21), and without lawful issue then living, the event had happened and the estate went over. That the case did not fall within the settled Pennsylvania rule of property, restricting the event to the lifetime of the testator. Indeed, from the opinions of the court, it seems doubtful if the contrary view was pressed.

> Thornton's Extrs. vs. Krepps, 37 *Pa. St.*, 391.
>
> Wm. Britton *et al* vs. J. Russell Thornton, 25 *Pgh. Legal Journal*, 158.

This latter case is not published in the regular reports, but is the one cited in the opinion of this court on page 54, as follows:

> "This conclusion accords with that of the Supreme Court of Pennsylvania in an action of ejectment for the same land brought in 1874, by John Russell Thornton, present plaintiff, against Britton, one of the grantors of the present defendant, Wilson, in which that court, as appears by opinion not officially reported, but copies of which have been submitted to us, held, and upon petition for reargument, affirmed that,
>
> > 'As to this particular tract of land the estate of Eliza Ann became extinct by the terms of the will itself at the time of her death without issue.'"

What the Pennsylvania rule of property was on this question is not discussed in the opinion of this court, though Mr. Justice Gray in delivering the opinion did state the English rule as follows:

> "But when the death of the first taker is coupled with other circumstances, which may, or may not, ever take place, as, for instance, death under age, or without children, the devise over, unless controlled by other provisions of the will, takes effect according to the ordinary and literal meaning of the words upon death under the circumstances indicated at any time, whether before or after the death of the testator;"

and cited in support of this rule O'Mahoney vs. Burdette, *L. R. 7 H. L.*, 388, 395.

2nd Jarmin on Wills, chap. 49.

While this may be a correct statement of the English rule, the Pennsylvania cases we have cited of,

Stevenson vs. Fox,
Caldwell vs. Skilton,
Estate of Mary Biddle,
Schoonmaker vs. Stockton,
Shutt vs. Rambo,
Karker's Appeal,
Fharney vs. Holsinger,
Mickley's Appeal,
Fitzwaters' Appeal,
McCormick vs. McElligott,
King vs Frick,
Morrison vs. Truby,
Cole vs. Ayres, and
Mitchell, admr., vs. P. Ft. W. & C. Ry. Co.,

show that it is not a correct statement of the Pennsylvania rule.

This question was directly considered by the Supreme Court of Pennsylvania in the case of Mickley's Appeal, 97 *Pa. St.*, 514.

The counsel for the appellant there contended that the bequest over was a good, executory bequest, and that the contingency of death was not restricted to death in the lifetime of the testator, but being coupled with the circumstances making it really contingent the words of the will must mean death at any time, and for such construction cited O'Mahoney vs. Burdett, 7 *Law Rep.*, and other authorities cited by this court in its opinion in Britton vs. Thornton, *supra*. On this contention Chief Justice Sharswood, delivering the opinion of the court, after referring to the argument of appellant's counsel, said :

> "He is sustained by some English cases which are not of authority with us. * * * * * * * It is very clearly settled, both in England and in this State, that if a bequest be made to a person absolute in the first instance, and it is provided that in the event of death, or death without issue, another legatee or legatees shall be substituted to the share or legacy thus given, it shall be construed to mean death or death without issue before the testator. The first taker is always the first object of the testator's bounty, and his absolute estate is not to be cut down to an estate for life, or what is practically the same thing, to be subjected to an executory gift over upon the occurrence of the contingency of death or death without issue at any future period within the rule against perpetuities without clear evidence of such an intent : Caldwell vs. Skelton, 1 *Harris*, 152 ; Estate of Mary Biddle, 4 *Casey*, 59 ; Karker's Appeal, 10 *P. F. Smith*, 141 ; Fahrney vs. Holsinger, 15 *P. F. Smith*, 388 ; McCullough vs. Fenton, *Id.*, 418. In Jessup vs. Smuck, 4 *Harris*, 327, the general rule is recognized, though in that case the court, upon the construction of the whole will, thought the intention of the testator was very clear, that he meant death

'without marriage' at a period subsequent to his own death. In the will before us it is strongly contended that death without issue living at the death of the first taker evinces the same intention. But it is not easy to draw such an inference from those words alone. Mr. Smith, in his work on executory interests, maintains that where the gift over is not merely dependent upon death, but upon dying unmarried and without issue, the event will be construed to mean not a death generally at some time or other, but a death in the testator's lifetime, if the fund or property itself, and not merely the interest or income, is given absolutely to the person whose death is spoken of: sec. 662. In the English cases a distinction is made between devises of realty and bequests of personalty *which has not been recognized in this state.*"

(II.) If the question as to the nature and extent of the title which Amanda Stevens took under the will of Mr. Stevenson is open in the Federal courts for original investigation, then we assert that she took a fee simple absolute.

If the devise be construed a fee tail, it was barred and became a fee simple.

If the devise be construed a fee with limitation over, the fee became absolute, because (*a*) the event upon which the limitation must happen was under the rule of property in Pennsylvania restricted in time to the lifetime of the testator, and admittedly it did not so happen. (*b*) The conditions, upon the non-performance of which the estate

was to go over, were performed by Amanda. She did not die unmarried—she married and had offspring by her husband—and therefore the estate did not go to John Barber's heirs.

(*a*) *The estate is a fee tail.*

The language to be construed is as follows:

"In the event of Amanda dying unmarried, or if married dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally among the heirs of John Barber, of Columbia, Pennsylvania."

The word "offspring" used in this clause of the will has the same legal significance as the word "issue" used in similar clauses.

"The word offspring, in its proper and natural sense, extends to any degree of lineal decendants and has the same meaning as issue."

17th *Amer. and Eng. Encyclopedia of Law*, page 178.

"When a man uses the terms 'offspring', or 'issue', or 'decendants', they are vague expressions, which no doubt on the particular context may mean children or remote decendants; but *prima facie* it can hardly be supposed to mean 'children' when that simple word is so obvious a one to use."

Per Kindersley, V. C., in Young vs. Davies, 2 *Dr. & Sm.*, 167.

"Offspring is synonomous with 'issue.'

Thompson vs. Veasley, 3d *Drew*, 7.

In the case of Allen vs. Markle, 36 *Pa. St.*, 117, the Supreme Court of Pennsylvania, speaking of the particular will involved in that case, found that the words "offspring" and "issue" had been used interchangeably by the testator as having the same meaning, and yet held, per Strong, J.,

> "And if he had not defined the term 'offspring,' the law has in repeated instances. It is regarded as *nomen collectivum*. Offspring, then, is a word of limitation, not of purchase. Those embraced in its meaning take by descent, not as primary objects of the testator's bounty."

See also Denn vs. Puckey, 5th *Term Reports*, 306.

The word "offspring" thus being synonomous in law with the word "issue," the clause under consideration is to be read as if written:

> "In the event of Amanda dying unmarried, or if married dying without issue by her husband, then these lots are to be sold," &c.

The effect of inserting the words, "by her husband," can only be to restrict the meaning of the general word "issue" to lawful issue; so defining the words "by her husband," the clause of the will is the same as if written,

> "In the event of Amanda dying unmarried, or if married dying without lawful issue, then these lots are to be sold," etc.

In Vaughn vs. Dickes, 20 *Pa.*, the words of the will were:

> "And it is further my will that should my son Peter Dickes not marry, and have lawful issue, then" over.

The Supreme Court held that—

> "As Peter could not have lawful issue unless he married, we may disencumber the sentence of the marriage condition,"

and so disencumbering it the court read the will as if written:

> "Should my son, Peter Dickes, die without lawful issue, then, etc."

So in our case, as Amanda could not have lawful issue without marriage, we may disencumber the sentence of the marriage condition as was done in Vaughn vs. Dickes, and

following cases; and so disencumbering it the sentence would read:

> "In event of Amanda dying without lawful issue, then these lots are to be sold, etc."

So reading the will we have the ordinary case of a limitation over after an indefinite failure of issue, void as an executory devise; good, as a vested remainder, subject to be barred by fine, or common recovery, and now, under our statutes, by deed executed and acknowledged in accordance therewith, which the verdict in this case has found to have been done. This has been the unmolested construction of such clauses in Pennsylvania, certainly ever since the case of Eichelberger vs. Barnitz, 9 *Watts*, 447.

In Eichelberger vs. Barnitz, the devise was as follows:

> "And further my will is, because my son Henry has not yet married, that if he should die without leaving any living issue, that then his full share shall fall or go in equal shares to my other three children, Adam, Anna Mary and Susanna."

The question then before the court was as to the estate which the son Henry took under this devise. The court, in the consideration of this question, then declared the law as to the proper construction of such clauses, which has remained the rule of property in Pennsylvania ever since; we quote from the opinion:

> "Questions as to the effect of words in wills similar to those used in the present one, in creating an estate tail in the testator, or an estate in fee, with an executory devise over, have been so frequent that their construction must be considered as settled by authorities, which we are not at liberty to subvert, even if we do flatter ourselves with the idea that we could delineate a more perfect system on this refined subject than that which existing law established. The principle has now become a settled rule of property in relation to lands, that if a devise

> be made to one in fee, and if he die without issue, or on failure of issue, or for want of issue, or without leaving issue, then over to another in fee, the estate of the first taker is a fee tail, which, if he had issue, passes to them *ad infinitum* by descent as tenants in tail. The estate vests in the first taker fully, and to all intents and purposes as a fee tail, and any devise over as to the failure of such, must, of course, be after an indefinite failure of issue, and bad as an executory devise. It is good as a vested remainder, subject to be barred by a fine or recovery or deed executed by tenants in tail under the Act of Assembly."

In speaking of the rule of construction of such clauses thus laid down, the court in Hackney vs. Tracy, 137 *Pa. St*, decided in 1890, has said:

> "We have repeatedly said that the case of Eichelberger vs. Barnitz has never been shaken, and it is certainly the law of this state at the present time. There have, undoubtedly, been cases in which we have held that where language somewhat similar was used, 'the failure of issue' upon which the estate of the first taker was to determine, was a definite, and not an indefinite failure of issue, but in all these cases, some particular reasons, founded upon language of the will indicating that the testator intended a definite failure of issue, controlled the decision. It is contended for the appellants that such a reason exists in the present case, in the fact that the limitation over is to the sister Mary by name, and that she being a living person at the death of the testator a definite failure of issue must have been intended, and that such a limitation was not too remote to sustain an executory devise. There are cases in which such a fact is held important, in connection with other considerations, but standing alone it is clearly not sufficient, as has been held in many of the cases. Thus, in Eichelberger vs. Barnitz, the limitation over was to the testator's other three children, Adam, Anna Mary and Susanna. They were the testator's own children, and were specifically named as second takers, which might well be urged against the failure of issue being regarded as indefinite, yet it was so held."

The cases wherein it was held that the words "failure of issue," or "without leaving issue," or similar expressions, imported a definite failure of issue, have all been based upon the peculiar wording of the will, rebutting the *prima facie* meaning which the law has attached to the use of such expressions. As said by Judge Sharswood in Taylor vs Taylor, 63 *Pa. St.*, 483:

> "The word 'issue' in a will means *prima facie* the same thing as 'heirs of the body,' and in general is to be construed as a word of limitation, but this construction will give way if there be *on the face of the instrument* sufficient to show that the words were intended to have a less extended meaning, and to be applied only to children or to descendants of a particular class or at a particular time."

So, in order to construe such expressions as intending a definite failure of issue, we must find sufficient *in the language of the testator* to rebut the meaning which the law places upon the words, and if such cannot be found the established definition of the law gives the rule for the construction of the words.

The learned counsel for the plaintiffs in error think they have discovered sufficient in the will of James S. Stevenson, to rebut the *prima facie* meaning which the law has placed upon such clauses. We will consider each of the matters relied upon by counsel for the plaintiffs in the order in which they are given in plaintiff's brief.

(2)—The second matter found by the plaintiff's counsel to rebut the established meaning which the law has placed upon such clauses is the direction,

(1)—The first thing relied upon by the plaintiffs to rebut the *prima facie* meaning of such clause is, as expressed by themselves,

> "The direction to sell the lots at the death of Amanda without offspring."

We respectfully submit that there is no case in Pennsylvania in which the power or direction to sell the property devised, alone and of itself, has been held to limit the estate of the first taker. In all the cases where the power of sale given by the will has been held to indicate a definite failure of issue, it was so held because the language of the will indicated that it was the testator's intention that such power should be exercised *by a person or persons living at the time of his death*, and only then in connection with other things. In our case, however, there is no language employed by the testator to indicate any such intention. The power of

sale given, or the direction to sell, is not given to or charged by any language of the testator upon his executors named in the will, or the survivor of them, but a sale by anyone, lawfully invested with the right to exercise the power of the will *at any time*, such as an administrator de bonis non c. t. a., would satisfy the intention of the testator so far as that intention can be discovered from the language employed. There is nothing in the language of the will from which it can be inferred that the testator contemplated the sale by persons then living, or by the survivor of them.

In the case of Taylor vs. Taylor, 63 *Pa. St.*, 461, the expression of the will was:

> "But in case my daughter shall depart this life not leaving lawful issue as aforesaid, it is then my will that *my executors or the survivor of them* shall

> sell at public sale (but not until after the death of my wife); * * * and the net proceeds of the sale it is my will that it be divided in the following manner, namely," &c.

In this case, it will be seen, the direction of the testator is explicit that the sale shall be made by his executors, or the survivor of them, clearly contemplating a sale in the lifetime of a then living person and a division of the proceeds by such person.

In Middleswarth's Administrator vs. Blackmore, 74 *Pa. St.*, 414, the clause of the will in this respect was as follows:

> "And I further direct that in case my son Jonathan shall die without leaving any legitimate issue, then it is my will that the real estate herein bequeathed to him shall be sold, and after the payment of all the specific sums hereinbefore mentioned which is enjoined on him to pay, then it is my desire

> "to divide the proceed of such sale among living persons."

Here again the language of the will is unfortunate for their contention. The direction is:

> "Then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber."

At the time the will took effect John Barber was living, and had certain children living. The testator, however, in the clause does not direct the division amongst the children of John Barber, but amongst *his heirs*, and as there can be no heir of a living person the legal meaning of the phrase certainly contemplated a division *only after John Barber's death*, and then among his heirs whosoever they might be. That he used the word "heirs" in its proper meaning is manifest from the next succeeding clause of the will, wherein he devised an estate in fee to John Barber as follows:

> "I give and bequeath to John Barber, of Columbia, *and his heirs*, the lots," etc.

Clearly in this clause he did not mean "children" by the word "heirs," but intended to give, as he did give, by appropriate language, an estate in fee simple. The word "heirs" in the one clause has precisely the same meaning as in the other. There is no direction, therefore, in our will to divide the proceeds among living persons, but the direction is to divide them among "heirs" of a living person, thereby clearly manifesting that he only contemplated such division as a remote possibility, or, at least, after the death of John Barber, and not during his lifetime. As was said by Judge Ewing:

> "The legatees of the proceeds of the property, if sold, were not necessarily in being or known to the testators; it is to the heirs of John Barber; the same words he uses in another part of the will,

> 'John Barber and his heirs,'
> evidently in the latter case not meaning children."

In the cases referred to by the plaintiffs, above cited, the direction was to divide amongst living persons named in the will. In the Taylor case the proceeds were to go:

> "To the children of my wife's sister, Hannah Baker."
> "To the children of my wife's deceased sister, Mary Skelton."
> "To the children of my sister, Rebecca Patterson, and Enoch Hannum."
> "To the son of my deceased sister and Jesse Bonsall."
> "To the son of my deceased sister, Tacy Bonsall."

In the Middleswarth's case the testator had in the previous portion of his will mentioned his legitimate grandchildren, giving the name of the parent; one, a son of the testator, was then described as deceased, and a division after the death of Jonathan without issue was directed to be made

> "amongst all my grandchildren that is now or may hereafter be born."

The division, therefore, directed by these wills was clearly a division among persons, some of whom were then living, and referred to as such; again manifesting that the testator contemplated a division in the life of persons then living.

There certainly is no clear expression in our will that the testator contemplated a division among then living persons.

In neither of the cases cited was the decision placed upon the ground that the limitation over provided for a sale by living persons and distribution of the proceeds among persons in being at time of testator's death. In Taylor vs. Taylor the determining point found was that the testator had used the word "issue" as synonymous with "children," and,

therefore, it was in that case a word of purchase and not of limitation. This is perfectly apparent from the following extract from the opinion of Judge Sharswood:

> "The testator gives to his wife and daughter, or in case of the death of one of them, to the survivor, all his real estate during their natural lives, and in case his daughter 'shall depart this life leaving lawful issue' then his real estate to descend to such lawful issue, their heirs and assigns forever. He immediately adds these words: 'And, further, it is my will that in case my daughter shall depart this life before her mother, leaving lawful issue, then such issue shall enjoy and inherit *their mother's right* from the time of her death.' No declaration could well be more express to show *that by issue he meant children;* for they were to enjoy and inherit 'their mother's right' from the time of her death.
>
> "The devise over, which is relied upon as enlargeing the estate in tail, follows this clause:
>
> "'But in case my daughter shall depart this life not leaving lawful issue as aforesaid, it is then my will that my executors or the survivors of them shall sell,' etc. 'Lawful issue as aforesaid' can only mean such issue as by the clause immediately preceeding were to enjoy and inherit 'their mother's right,'—of course, *children.*"

The meaning of the word "issue" having thus been found to be children, of course, it was fatal to an estate tail by implication; the case then fell within the well established rule aptly illustrated by Hill vs. Hill, 74 *Pa.*, 173.

The grounds upon which the Middleswarth case was really put we shall hereafter show.

A limitation over to persons named and in being at time of testator's death or of the making of the will is a common feature in many of the cases where the estate created has been adjudged a fee tail in the first taker.

In Eichelberger vs. Barnitz, the leading case in Pennsylvania, the limitation over was to other children of the testator by name, all living at the death of the devisor.

In Hackney, vs. Tracey, 137 *Pa.*, 53, the limitation over was to a named sister of the testator living at the time of his death; and it was expressly said by the court that this circumstance was not sufficient to show that the testator intended a definite failure of issue.

So in the following cases:

Lapsley vs. Lapsley, 9 *Pa.*, 130.

Allen vs. Henderson, 49 *Pa.*, 333.

Cochran vs. Cochran, 127 *Pa.*, 486.

The absolute answer to these first two suggestions of the plaintiffs in error is found in the decision in Criley vs. Chamberlain, 30 *Pa.*, 161.

In the case cited the will was as follows:

> "I give, devise and bequeath unto my son, Jonas Chamberlain, all my real and personal property, etc., (describing the land), to hold to him, his heirs and assigns forever.
>
> "But if my said son, Jonas Chamberlain, should depart this life without leaving lawful issue, my will then is that my executors, or the survivor of them, shall sell at public sale all my estate, real and personal, * * * and the proceeds of such sale or sales of said property I give and bequeath to my nephews and nieces, John, William, etc."

In this will, it will be seen, we have a direction to the executors or the survivor of them to sell, and to divide the proceeds amongst persons living at time of testator's death; yet, the court held that the limitation over was upon an indefinite failure of issue, and that Jonas took a fee tail in the lands devised.

In Wynn vs. Story, 38 *Pa. St.*, 166, the testator devised certain real estate to Robert S. Story for life, and if he should die leaving lawful issue to him or his heirs and assigns forever; but if he should die, leaving no such lawful issue, then he ordered that the property should be sold and divided among certain persons then living.

The Supreme Court of the State, Justice Strong, late of this court, holding that this created a fee tail, said:

> "The argument of the plaintiff in error is that the testator contemplated a definite and not an indefinite failure of issue of the first taker. The thing given was real estate. However much the rule may be relaxed in regard to bequests of personalty, it is inflexible as regards devices of realty; that words such as are used in this will import an indefinite failure of issue. *Smith*, in his work on *Executory Interests*, p. 538, collects a large number of cases, and remarks in regard to them that 'it will be perceived that, as regards real estate, no distinction exists between the words "die without issue," and "die without leaving issue," and "in default," or "on failure," and "for want of issue," but that all those expressions, in devises made before the year 1838 (the date of the recent British statute) are construed to import of themselves an indefinite failure of issue.' The rule has again and again been asserted to be the law of Pennsylvania. The case was therefore rightly decided."

(3)—The third matter found by the plaintiffs by which to rebut the definition of the law, is in combining the contingency of death, unmarried, with death without offspring, if married.

The cases in Pennsylvania, however, have settled this contention against the plaintiffs. In Vaughan vs. Dickes, 20 *Pa.*, 509, the words of the will were:

> "And it is further my will that should my son Peter Dickes not marry and have lawful issue, then the said real estate hereinbefore devised to him shall go to my daughter Catherine Dickes and her heirs, forever."

These words are to the same effect as if the testator had said, that if his son should die unmarried, or if married, die without lawful issue; and so as the court held in that case.

> "as Peter could not have lawful issue unless he married, we may disencumber the sentence of the marriage condition;"

and so disencumbering it the court read the will as if written,

> "should my son Peter Dickes die without lawful issue, then, etc."

So in our case, as Amanda could not have issue by her husband unless she married, we can disencumber the sentence of the marriage condition, and read it as the court read the Dickes will. "In the event of Amanda dying without lawful issue, then, etc." So reading it as the court in the case cited said:

> "But this form of expression, like its equivalents, 'if he die before he has any issue,' or 'on the failure of issue,' or 'for want of issue,' or 'without leaving issue,' has been adjudged, again and again, both in England and this country, to import a general and indefinite failure of issue."

The rule of construction adopted in Vaughan vs. Dickes was followed by the Supreme Court in Mattlack vs. Roberts, 54 *Pa.*, 146, where the expression in the will was:

> "and in the case of the death of either of my children, unmarried, or without issue, then I do order that the shares of said child or children, so dying, may be divided equally among my surviving daughters, or their heirs."

Here the expression,

> "and in the case of the death of my children, unmarried, or without issue,"

is the precise equivalent to the expression in our will,

> "In the event of Amanda dying unmarried, or, if married, dying without issue."

The court held, following Vaughan vs. Dickes, that the expression should be disencumbered of the marriage condition, as of no importance in the construction, and so,

> "dying before marriage indicated nothing definite in the period when the failure of issue should take place."

Vaughan vs. Dickes was also again followed in the case of McCullough vs. Fenton, 65 *Pa.*, 418, where it was emphatically announced that Vaughan vs. Dickes had settled the effect, or rather the want of effect of the words "or not being married," in such clauses, and the question was no longer *res integra.*

> "We must consider that these words will not make the failure of issue definite. In that view the sentence is to be disencumbered of the marriage condition."

(4)—The fourth cause for finding that the testator has used language to rebut the definition of the law is supposed to lie in the use by the testator of the expression "in the event of," and the word "then;" and it is supposed that these expressions mark the death of Amanda as the time at which the failure of issue shall be fixed.

The expression

> "in the event of Amanda dying unmarried, or if married, dying without offspring," etc.,

certainly means, and can only mean, that *if* Amanda should die unmarried, or *if* married, should die without issue; or, *upon* Amanda dying unmarried, or if married, dying without issue, etc.

The words "in the event of" were clearly used to express the contingency referred to. There can be no doubt or ambiguity as to the meaning of this expression. Nor can the use of the word "then" have the effect contended for and it has never been given such effect in any of the cases cited.

In the leading case of Eichelberger vs. Barnitz, the language was:

> "If he shall die without leaving any living issue, that *then* his full share shall fall or go in equal shares, etc."

Here the adverb "then" was used as a particle of reference, and the devise over was *to persons then living*, other children of the testator.

In Robinson's Estate, 119 *Pa. St.*, 418, the will provided that if the devisee should die

> "without leaving issue, *then* the said interest hereby devised to her shall revert to my estate."

In all such cases "then" is not considered an adverb of time, but a mere particle of reference connecting the result to follow upon the happening of the contingency previously

expressed, and is the equivalent of "in that event," or "if that happens." 11 *Encyclopedia of Law*, 908.

Lawrence vs. Lawrence, 105 *Pa. St.*, 335.
Reinoehl vs. Shirk, 119 *Pa.* 108.

The case of Snyder's Appeal, 95 *Pa. St.*, 174, cited by plaintiffs' counsel with such apparent confidence as sustaining the effect of the use of the word "then" which they contend for, is the best authority we could cite to show that such word has no such effect. In that case the bequest was of personal property, and the construction of the will given by the court is expressly placed upon the ground that the subject matter was a bequest of personal property and not of real estate. Mr. Justice Green, in delivering the opinion of the court, said:

> "In the present case the subject matter of the contention is personal estate exclusively. It has for a very long time been held that in bequests of personal estate the rule of construction on the limitation over in the event of dying without issue differs from the rule which prevails in the devise of real estate upon the same kind of limitation."

And the case of Clark vs. Baker, 3 *Sergeant & Rawle*, 479, is cited as establishing the doctrine that,

> "these words, 'without leaving issue,' applied to personal estate had been held to mean issue living at the death of the person to whom the property is given in the first instance. *But not so in regard to land.*"

In Miller's Estate, 146 *Pa. St.*, cited by counsel, to sustain the effect which they seek to give to the use of the word "then," the testator gave to his grandson, Albert, an equal share of his estate, real and personal; and provided:

> "But if said Albert *shall die before* he has any heirs, then his share shall revert back among my other heirs."

This court held that this language contemplated a definite failure of issue because,

> "The contingency upon the gift over is dependent, and must, by the very terms of the will, happen *before* the death of Albert."

The case of Hill vs. Hill, 71 *Pa. St.*, 173, several times cited by the plaintiffs, and other similar cases, are easily distinguishable from this. The clause in the Hill case was as follows:

> "It is my will and I so order that should my daughter, Sarah Ann Hill, die leaving no issue *or child* that her share shall fall back to my estate," etc.

It was held that the use of the word "child" as synonomous with "issue" by the testator restricted the meaning of the word "issue" to children, and thereby made the clause provide for a definite failure of issue and not an indefinite.

There are many other cases like Hill vs. Hill, where the use of the word "child" or "children" has made the devise over construed as dependent upon a definite failure of issue. In our will there is no word used by the testator in any way restricting the general meaning of "offspring" or "issue," so that these cases do not support the plaintiffs' contention, as we have not here the elements upon which the decisions were made.

We contend that the plaintiffs have struggled in vain to take this case from under the rule established in Eichelberger vs. Barnitz, which, as declared in Hackney vs. Tracy, *supra*,

"has never been shaken, and is certainly the law of this state at the present time."

The rule in Eichelberger vs. Barnitz has been applied in a multitude of cases in Pennsylvania in the construction of devises similar to the one now before us.

Hoff's Estate, 147 *Pa.*, 636.
Ray vs. Alexander, 146 *Pa.*, 242.
Hackney vs. Tracy, 137 *Pa.*, 53.
Cochran vs. Cochran, 127 *Pa.*, 486.
Reinoehl vs. Shirk, 119 *Pa.*, 108.
Bassett vs. Hawk, 118 *Pa.*, 94.
Carroll vs. Burns, 108 *Pa.*, 386.
Stone vs. McMullan, 10 *Weekly Notes*, 541.
Lawrence vs. Lawrence, 105 *Pa.*, 335.
Ogden's Appeal, 70 *Pa.*, 501.
Gast vs. Baer, 62 *Pa.*, 35.
Matlack vs. Roberts, 54 *Pa.*, 148.
Criley vs. Chamberlain, 30 *Pa.*, 161.
Vaughan vs. Dickes, 20 *Pa.*, 509.
Lapsley vs. Lapsley, 9 *Pa.*, 130.

Many more cases might be added to those cited, but reference to these will be sufficient to illustrate the application of the rule of Eichelberger vs. Barnitz in the construction of clauses, in many of them, of the identical force and effect of the clause in controversy here. By the rule of property established by these decisions, we contend there can be no doubt that if Amanda Stephens did not take a fee absolute, she at least took a fee tail, under the will of James Stevenson, which has been properly barred under the statutes.

THE CASE OF MIDDLESWARTH EXECUTORS VS. BLACKMORE, 74 *Pa. St.*, 414, IS CLEARLY DISTINGUISHABLE FROM THE ONE AT BAR.

The plaintiffs insist that Middleswarth vs. Blackmore, 74 *Pa.*, 414, rules this case. It is only necessary to examine the facts and the reasoning of the court, upon page 420, to see what obvious distinctions there are between the will involved in that case and the will of James S. Stevenson.

In that case (which can only be properly appreciated by reading), the court recognized the rule of Eichelberger vs. Barnitz, cited *ante*, saying:

> "As a general rule and standing alone, the language 'die without leaving any legitimate issue,' must be understood to mean issue indefinitely. That the estate created would, in such case, have been one in tail is recognized by numerous English and American authorities. The principle is affirmed in Clark vs. Baker *et al.*, 3 *S. & R*, 470; Eichelberger vs. Barnitz, 9 *Watts*, 447; Criley vs. Chamberlain, 6 *Casey*, 161; Taylor vs. Taylor, 13 *P. F. Smith*, 481."
>
> "Does the whole will establish a different intention?"

Proceeding to examine this whole will, the court found the following different indications showing that the testator, by the language he used, intended a definite failure of issue on the death of Jonathan.

(I.) "The declaration that in case Jonathan died without leaving any legitimate issue, then the real estate devised to him should be sold *by the testator's executors, and the proceeds distributed by them*, evi-

dently points to a definite failure of issue. It manifests that this failure will occur during the lifetime of some one of his executors named."

There is no such direction in our will, which is the first point of difference.

(II.) "The land in which his wife had a limited estate, after the termination of that estate, was to be sold by his executors, and the proceeds thereof be distributed among the testator's grandchildren. In like manner, upon the death of Jonathan, without leaving legitimate issue, the land given to him was to be sold and the proceeds to be distributed by the testator's executors, the residuary portion thereof to be divided among his grandchildren. It is very clear that the testator had the same beneficiaries in his mind in each case. * * * * * * * In distributing the proceeds of the land in which his wife had a limited use, he gave the names of the several parents of his grandchildren who were to take, *thus fixing beyond any question that the recipients should be no further removed from him.* In the latter distribution he does not unnecessarily repeat the names of the parents of his grandchildren but evidently had the same persons in view. This excludes the idea that the issue of Jonathan had reference to some remote period of the future."

There is no similar clause in our will. On the contrary the beneficiaries to take upon the failure of issue, were the heirs of a person then living, and therefore could not be known or ascertained until after the death of such living person, plainly indicating that the testator contemplated no sale until after such death.

(III.) "The intention to refer to definite failure of issue is further shown by the fact that he had in his mind the contingency of Jonathan dying before all the legacies given to the testator's children had become due, or had been paid out of the residuary estate devised for that purpose."

There is no such provision or indication in our will.

(IV.) "Again, in forever debarring from the benefit of any bequests made, 'any of my grandchildren who shall be guilty of having an illegitimate child, or is guilty of the sin of intemperance, or that do wickedly and irreverently profane God's holy name,' and in giving it to those of them whose life and conversation is free from reproach, he manifestly had in his mind his *immediate* grandchildren, and excluded the idea of a more remote future when the character and habits of his beneficiaries should be inquired into."

There is no expression in our will from which any such intention can be inferred.

(V.) The testator accented the idea that it was one or more living persons who were to sell and distribute the real estate on the contingency happening, because he not only directed that his executors should distribute, but he added, (page 416), as to a portion of the proceeds to be distributed,

"then it is my desire and will that of the balance remaining $1,000 shall be paid by my executors (*or the surviving ones of them*) to the Foreign Missionary Society."

The will at bar has no such provision.

As will be seen by an examination of the opinions of the different Pennsylvania courts and the Federal Circuit Court,

this Middleswarth case was urged upon them by the plaintiffs, but they all agreed it did not rule the case at bar.

(B)—UNDER THE WILL AMANDA TOOK ON TESTATOR'S DEATH AN ABSOLUTE ESTATE IN FEE SIMPLE.

(*i.*) The Supreme Court of Pennsylvania, in a well reasoned opinion, held that Amanda took an absolute estate; that this absolute estate was not limited, but a clause substitutionary in character was inserted, which, in the event of

> "Amanda dying unmarried, or, if married, dying without offspring by her husband, then, those lots are to be sold and the proceeds to be divided equally among the heirs of John Barber."

That the dying without issue (which is what the clause means) the testator intended should take place in his lifetime, and as it did not the estate became absolute in Amanda on testator's death.

That this will admits of this construction that opinion proves. It is so well written and reasoned that no words of ours will add to it, and even if this court should hold that it is not conclusive, it is, at least, entitled to peculiar weight.

Bucher vs. Cheshire R. R. Co., 125 *U. S.*, 584.

As was said in Burgess vs. Seligman, 107 *U. S.*, 34,

> "for the sake of harmony, and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt."

In Jackson vs. Chew, 12 *Wheaton*, 154, in a case of construction of a will as to real estate, speaking of the nice distinctions that repeated cases had established, and of the rule differing in different states, this court added, that it would apply the settled rule of the state in which the land was situated.

We have hereinbefore, at considerable length, discussed the Pennsylvania cases bearing on the construction the Supreme Court of Pennsylvania gave to Mr. Stevenson's will, and it would but burden this brief to cite and consider them anew.

(*ii.*) There is another reason why the substitute estate did not vest in John Barber's heirs.

The event upon which the estate was to vest is described by the testator as follows:

> "In the event of Amanda dying unmarried, or if married, dying without offspring by her husband, then these lots are to be sold and the proceeds to be divided equally among the heirs of John Barber."

The contingencies are:

(1.) If Amanda died unmarried,

Or,

(2.) If she married, and yet died without offspring by her husband, the lots are to be sold.

Amanda did not die unmarried, but, on the contrary, she married, and by her husband had offspring.

Therefore, neither one of the events happened on which the estate was to go to John Barber's heirs.

How then, is it possible in any event for John Barber's heirs to take?

Our friends ingeniously seek to piece it out by saying that the limitation over means offspring living when she died.

The complete answer would seem to be that the will does not say so. It says nothing about the offspring living when Amanda dies, or that the offspring shall survive Amanda.

The condition simply is:

> "or if married dying without offspring by her husband."

It would have been quite easy to say, if the testator so meant, that not only must Amanda have had offspring by her husband, but that such offspring should be living at the time of her death.

He did not say so.

The claim now, however, is, that a construction of the actual words used shall be given by which these words shall mean the same as if the words

> "living at her death,"

or

> "surviving her,"

had been added.

We have, in the previous pages, considered the cases on this question, and although, in our judgment, its determination is not necessary to a decision of the case, for the reason hereinbefore given, yet, it does seem to us clear that John Barber's heirs, instead of showing that the contingency arose on which the devise to them vested, have, on the contrary, plainly shown that neither of these contingencies happened.

Amanda did *not* die unmarried, but, on the contrary, she married.

Having married, she did *not* die

"without offspring by her husband,"

but, on the contrary, she had offspring by her husband.

Test the plaintiffs' construction :

Suppose Amanda married—had children, who, in turn, married and had children, and before Amanda's death her own children died.

Can it be doubted Amanda's property, if she owned it when she died, would go to her grand children?

(III.) Nature of the plaintiffs' claim and the ingenious, though unsound, reasoning by which they seek to gain their end.

The plaintiffs contend that John Barber's heirs have an estate in fee simple in the land in controversy, and that you should so answer the question certified as to lead to that result.

The plaintiffs can only do this by applying Pennsylvania rules of property to the will of Mr. Stevenson, and inducing

this court to believe that the logical and proper result of such an application is that John Barber's heirs have now an estate in fee in this Pennsylvania land.

Right in their pathway they have the decision of three courts against them:

The Common Pleas Court of Allegheny County, where the lands are situated.

The Supreme Court of Pennsylvania.

The Circuit Court of the United States for the Western District of Pennsylvania, both judges sitting.

Each one of these courts held that the plaintiffs had no title whatever to the lands in dispute; each held that the title, absolute and indefeasible, was now in the Pittsburgh, Fort Wayne and Chicago Railway Company.

Two of the courts differed in the reasons given for the conclusion reached.

The Common Pleas opinion was delivered by Judge Ewing (the successful attorney in the much cited case of Middleswarth's Executors vs. Blackmore), who thought the devise created a fee tail in Amanda, which was barred under our statute and became a fee simple.

The Supreme Court of the state thought, taking the will as a whole, that the devise to John Barber's heirs was substitutionary in its nature, and was only to take effect if Amanda died in the testator's lifetime, and as she did not so die no title vested in John Barber's heirs, but, on the contrary, an absolute fee simple title vested in Amanda on testator's death.

The Circuit Court of the United States, when the case came before it, seemed to incline to the opinion that the

title was a fee tail in Amanda, which, barred, became a fee simple, but said :

> "We are satisfied that, *upon any admissable construction* of the will of James S. Stevenson, the title to the land in dispute is in the defendants."

Every one of the courts unhesitatingly said, the plaintiffs have no title whatever.

Why are all these Pennsylvania courts, held by Pennsylvania judges, ruling on the nature of a devise in a Pennsylvania will of land in Pennsylvania, to be disregarded?

Because, argues the plaintiffs in error, they differed in the reasons given for the conclusions reached.

But they did not differ in holding that the construction of Mr. Stevenson's will which the plaintiffs seek was wholly inadmissible.

They did not differ in holding, that under Mr. Stevenson's will John Barber's heirs took no title whatever.

They agree that, directly or indirectly, Amanda took a fee simple absolute under the will.

But assuming that learned real estate lawyers might differ on so nice a question, and that especially in Pennsylvania, where the peculiar rule limiting the event upon which the estate would go over to the lifetime of the testator, which renders the question quite close as to whether Amanda took an absolute estate in fee simple, or a fee tail; yet such difference merely emphasizes the care and work put upon this case by each one of the lower courts, and renders the more certain that their one conclusion agreed in by all—that John Barber's heirs have no title whatever—and that Amanda's estate under the will became a fee simple, absolute—is correct.

The general intent of the testator is to be gathered from his entire will, and when this general intent is determined it influences the construction of particular phrases and words.

For example: If it is found, as the Supreme Court of Pennsylvania held, that the general intent was to give Amanda an absolute estate in fee simple, and the substituted estate to the heirs of John Barber was to take effect *only and if* Amanda died during the lifetime of the testator, then this general intent would influence the court in determining what the testator meant by the words "the heirs of John Barber."

If the event upon which the estate was to go to those heirs must happen in the lifetime of the testator, and John Barber then had children, it tends to induce the court to believe that by the word "heirs" was meant children;—a construction, however, which, except for this general intent, would never have been reached.

Now, the plaintiffs indignantly denying the correctness of the conclusion of the Supreme Court of the state, yet, extract from it some of the conclusions as to particular parts of the will which were reached only because of the general position of the Supreme Court being right, and use such as admissions of the correctness of essential steps in the plaintiffs' line of argument—overlooking the material fact above referred to.

The plaintiffs also seek to show that Amanda was an illegitimate child of Mr. Stevenson. The case and the certificate are each barren of proof to this point. The plaintiffs certainly

did not prove it to be so on the trial below; and the certificate raises no question in reference to it.

We regard it as immaterial, even if it were in the case, which it is not.

If, as the plaintiffs argue, Amanda was to be the root of a new stock, which should have inheritable blood, then, it is exactly in line with our contention that her estate was such that it would go to her children, grandchildren, etc., if she died still seized of it, and thus it was not essential that Amanda should have children living at the time of her death to make her estate absolute—as the plaintiffs argue. Her remote descendants would take and this would necessarily make the estate a fee tail.

The argument that by the word "offspring" the testator meant children is not supported by one single case in Pennsylvania. All the cases are against it.

It is asserted that courts "anxiously seize" upon every circumstance to make the failure of issue definite. This is not so in Pennsylvania.

In Criley vs. Chamberlain, 30 *Pa. St.*, 164, the devise was to J. C., to hold to him, his heirs and assigns forever, and provided that if J. C. should depart this life without leaving lawful issue his executors should sell his estate and divide the proceeds among certain named living nieces and nephews, held, that J. C. took an estate in fee tail with a remainder in fee in the brothers and sisters and that the entail became an absolute estate in fee simple under an act of 1855.

The court said—page 165—

> "* * * No limitation shall be construed as an executory devise if it can be construed as a remainder."

The words of Mr. Stevenson's will are

> "In the event of Amanda dying unmarried, or, if married, dying without offspring, then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Penna."

The task the plaintiffs have is to prove

(I.) That the dying unmarried, or if married without offspring, is an event unlimited in time, and not restricted to the testator's death.

We have the Supreme Court of Pennsylvania announcing on this will the state rule of property, limiting the death to the lifetime of the testator, and we have cited *ante* numerous Pennsylvania cases to prove this peculiar Pennsylvania rule of property.

Britton vs. Thornton 112 *U. S.*, 526, relied upon to shew a contrary rule, we shew to be directly in line with two Pennsylvania cases construing the will involved in that case. Instead of a conflict of courts on the Pennsylvania rule both courts agree.

(II.) That the word "offspring" means *children* and at the same time Amanda's death is unlimited in time.

The Pennsylvania cases and indeed all the authorities *ante* construe this word "offspring" to mean issue, and do not restrict it to children.

If Amanda had not sold, but died in posession of the land and had grandchildren living, her own children dead, would any court have held those grandchildren did not take.

The testator evidently discriminated in using the word "offspring." If he had meant children merely he would, as his will shows, have said so.

Thus he gives lot 74 to

"Mary Livingston's *children.*"

Then he limits lot 73 to

"her sister's *children.*"

Then he bequeaths to

"the sons of James Stevenson."

He uses with nice discrimination the words "children," "heirs," "sons."

This fact being apparent what rule of construction would authorize a court to say that in the same will when the testator used the word

"offspring"

he did not mean

"offspring,"

but merely children.

(III.) That into this clause of the will must be read the words "living at her death" or "surviving her," and thus fix a definite and exact time when the "offspring" should be alive.

Such words are not in the will, and ingenuity has for many years exhausted itself in attempting to interpolate them in like cases.

(IV.) That the words "heirs of John Barber" should be restricted to mean "children of John Barber" while at the same time the time of death is unlimited.

There is nothing in the context to restrict the meaning of the word "heirs" except that the limitation over upon which the "heirs" took was during the testator's life, and inferentially this would induce a court to hold the word "heirs" meant children. But this construction the plaintiffs deny while at the same time they seek to extract from it that which makes for their own view based on a different intent.

It is difficult indeed to see how the words "the heirs of John Barber" can in this will be restricted to mean "the children of John Barber."

The testator discriminated in the choice of words. When he meant "children", he said so. When he meant "heirs" he said so.

Thus in this will he gives property directly to

"John Barber of Columbia."

He also in the same clause gives to

"the heirs of John Barber of Columbia."

And to

"John Barber, of Columbia, and to his heirs."

The limitation we are speaking of is to

"the heirs of John Barber of Columbia."

He gives, see above, to

"Mary Livingston's children."

"to her sister's children."

"to the sons of James Stevenson."

He also gives

"to James Wright, of Columbia, or his heirs,"

and

"to the heirs of James Wright, of Columbia."

How can the court give other than the ordinary meaning to the phrase,

"heirs of John Barber."

(V.) To induce this court to believe that all the Pennsylvania courts presided over by Pennsylvania lawyers were in error in the application of Pennsylvania rules of construction and rules of property to Mr. Stevenson's will, and to further induce it to now establish a rule of property in Pennsylvania which would reverse alike the Supreme Court of Pennsylvania, the Common Pleas of Allegheny County, and the Circuit Court of the United States for the Western District of Pennsylvania; and which would overrule the line of Pennsylvania cases on the one hand, beginning with Caldwell vs. Skilton, and ending

with Mitchell adm. vs. Pittsburgh, Ft. Wayne & Chicago Ry. Co., and on the other hand, also overrule the other line of Pennsylvania cases beginning with Eichelberger vs. Barnitz, and running through dozens of like cases to Hackney vs. Tracy, 137 *Pa. St.*, decided in 1890, and Grimes vs. Shirk, 169 *Pa. St.*, 74, decided in 1895, and incidentally to overrule such Pennsylvania cases as Vaughn vs. Dickes, Matlack vs. Roberts, McCullough vs. Fenton, and Robinson Estate cited *ante*.

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Supreme Court of the United States.

431.

No. 885 OCTOBER TERM, 1895.

SAMUEL WHITEHILL BARBER, RICHARD TREAT LEECH, and MARY ANN LEECH, his Wife, in right of said Wife, EDWARD P. CLARKE, GEORGE HEPBURN WATSON, and ANNE TOWNSEND WATSON, his Wife, in right of said Wife, and CARVER WORTHINGTON BARBER, Plaintiffs in Error,

(Plaintiffs below)

VERSUS

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY, and THE PENNSYLVANIA COMPANY, Lessee, Defendants in Error.

(Defendants below.)

On a Certificate from the United States Circuit Court of Appeals for the Third Circuit.

ARGUMENT IN REPLY FOR PLAINTIFFS IN ERROR.

WILLIAM T. BARBER,
of Counsel.

JOHN S. FERGUSON,
S. DUFFIELD MITCHELL,
Attorneys.

(16,175.)

SMITH BROS. FRANKLIN PRINT., 405 GRANT ST., PITTSBURGH, PA.

SYNOPSIS OF ARGUMENT.

Certain statements of fact of counsel for defendants in error explained and denied.....Pages 1 to 5.

Paragraph two of certificate shows that the facts thereof are in this case only.....Page 2.

Such facts were not before the state courts, and were not so treated by the supreme court.....Page 4.

The facts of said paragraph were proven by other evidence than the certificate of probate.....Page 5.

Burgess vs. Seligman and *Folsom vs. Ninety-Six* pronounced the rule of this court as to its duty to follow state adjudications.....Page 6.

The facts in the second paragraph of the certificate are relevant to show the circumstances surrounding the testator at the first publication of his will, and to show whether he contemplated Amanda's death before his own death.....Pages 7 to 9.

The report of this case in the state reports shows that a full argument of the case was suppressed. This is sufficient to show to this court that it was not the deliberate judgment of the state court.....Page 9.

Britton vs. Thornton is in accordance with, and not in conflict with, the Pennsylvania decisions..Pages 10 to 13.

Schoonmaker vs. Stockton is not opposed to Britton vs. Thornton: it was decided upon entirely different reasons which cannot apply here. That case furnishes no rule for this case.....Page 12.

Mickley's Appeal did not rule that Britton vs. Thornton and O'Mahoney vs. Burdett are not law in Pennsylvania ..... Pages 12 and 13.

Middleswarth vs. Blackmore coincides with this case in controlling features. The cases compared.. Pages 13 to 19.

In *Criley vs. Chamberlain* and *Wynn vs. Story* the effect of the power of sale therein was not raised by counsel or discussed by the court ..... Pages 20 to 22.

Defendants' suggested construction of "heirs of John Barber" is meaningless, and forces an absurd construction upon the words ..... Pages 22 and 23.

A plain, natural construction of the whole will shows that plaintiffs' contention as to the meaning of the devise to Amanda is the one probably intended by testator ..... Pages 23 to 27.

Cameron vs. Coy, decided by the Pennsylvania supreme court on the same day as this case, is irreconcilable with that court's construction of this will..... Pages 24 and 25.

Eichelberger vs. Barnitz and *Langley vs. Heald* are leading cases in Pennsylvania upon their respective branches of the law ..... Page 25.

The having of offspring did not make absolute the devise to Amanda ..... Pages 27 to 36.

"Dying without children" means *dying without leaving children at the death.* Cases thereon considered... . ..... Pages 27 to 33.

But "dying without having children" means *without having had children* ..... Pages 31 and 33.

The statute *de donis* applies to this gift and is in force in Pennsylvania..... Pages 34 to 36.

Supreme Court of the United States.

No. 885 OCTOBER TERM, 1895.

SAMUEL WHITEHILL BARBER, et al., Plaintiffs in Error,

VERSUS

PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY, et al., Defendants in Error.

Argument in Reply for Plaintiffs in Error.

Counsel for defendants in error, in order to place their case in a more advantageous aspect, have made certain statements of fact, which call for explanation and denial.

They say:

(1). That the facts as to the time and circumstances of the publication of the will were fully before the state courts, when the will was under consideration therein.

(2). That the only evidence upon which were based the findings of fact as to such time and circumstances of publication, made by the circuit court, was the register's certificate of probate, attached to the certified copy of the will.

(3). That the special verdict, found in the state court, incorporated the whole will as part of the findings of fact, and that the will, thus made part of the special verdict, included the register's certificate as to the probate thereof.

(4). That at the time of the making of the will the testator was in good health with every reasonable prospect of a long life before him.

Paragraph 2 of the certificate of the United States circuit court of appeals, as printed in its amended form upon page 6 of brief of plaintiffs in error, expressly avers that the "*facts as to the time and circumstances of publication were not found by the special verdict, on which judgment was entered in the ejectment suit in the state courts of Pennsylvania.*" That averment was not part of the findings of fact, as originally filed by the said court, and it was upon application of counsel for all parties in interest in this case, that the court of appeals made the amendment suggested The truth of this assertion is at once apparent upon examination of page 4 of the *transcript of record* of certificate, as printed under the supervision of the clerk of this court. Counsel for defendants in error, having joined with counsel for plaintiffs in error in an application, *inter alia*, for such amendment, are now estopped from alleging that all the facts as to the time and circumstances of the publication of the will were before the state court, when the will was under consideration therein. It is true that Judge Ewing did give weight to the facts appearing by the affidavit of probate, for in his opinion he states that "the facts as to its execution appear from the probate endorsed on the will." (See page 7 of brief of plaintiffs in error). But an examination of the certified copy of the record of this case in the United States circuit court of appeals, on file in the office of the clerk of this court, will disclose at page 31 thereof that the special verdict of the jury, after setting forth the particular devise to Amanda, states that "*for greater certainty we incorporate the whole of said will as part of this finding of facts.*" Nothing was mentioned therein about the facts as to the time and circumstances of the publication of the will, because it was not at the time of trial of the case deemed

essential that the special verdict should find such facts. It was "*the whole of said will,*" and not the affidavit of probate endorsed on it, which was incorporated as part of the finding of facts. In strictness, therefore, the will only and not the affidavit of probate was part of the special verdict.

Counsel for defendants are in error when they state that in addition to the facts, found by the special verdict, there was testimony offered in the state court by the plaintiff, and, among other things a certified copy of the will was offered, to which was attached the register's record of probate. At the trial of the case after the jury was sworn, they were directed by the trial judge to find, as a special verdict, all the facts therein, which had theretofore been reduced to writing and agreed upon by counsel. A copy of the will was not even attached to the special verdict. No testimony of any description was offered by either side. The finding of facts, as agreed upon by counsel, was all that was in the case. Judge Ewing in all probability consulted the original will and the affidavit of probate thereon, because his opinion states that "the original will is without punctuation." (See page 7 of brief of plaintiffs in error.) He may have used in the preparation of his opinion a copy of the will, furnished by counsel.

It will be seen that it was not only "*the circumstances,*" but also "*the age of the devisee and the will,*" which left the court of common pleas "*in no doubt that the contingency of Amanda's death did not mean her death before the testator.*" (See page 8 of brief of plaintiff in error.) What weight "*the circumstances*" had with Judge Ewing in reaching his conclusion respecting the application of the interpretation above mentioned it is impossible to say, but in view of "*the age of the devisee and the will,*" as he further suggests, it is most probable that his construction of this phase of the case would have been the same had he not examined the affidavit of probate. Authorities upon pages 36 to 43 of brief of plaintiffs in error are ample vindication

for the determination by Judge Ewing of this phase of the case; that determination was in strict accordance with both reason and authority, had the facts as to the *circumstances* and *time* of publication not been in the case.

It is true that plaintiffs in error, as appellants in the supreme court of Pennsylvania, did print in the appendix of their paper book the whole of the will of James S. Stevenson and the register's certificate of probate thereon. It is certainly apparent that the supreme court applied strictly the rule, that a special verdict must find all the essential facts in the case, and cannot be aided by intendment of facts, implication or reference to extrinsic facts appearing upon the record, and refused to consider the facts as to the time and circumstances of publication of the will to be part of the case before it. If the supreme court had considered that the material facts of the register's record of probate, which set forth that the two attesting witnesses deposed that, a few hours before testator's death on October 16th, 1831, the date of Stevenson's death, they subscribed their names to the will as witnesses (see opinon of Judge Acheson upon page 17 of brief of plaintiffs in error) were properly before that court, it would never have declared that "no presumption could arise from the fact of making a will that testator expected to die before she should attain a marriagable age. So far as appears *from the record* he may have had an expectation of long life." (See page 13 of brief of plaintiffs in error.) If these facts were before the supreme court, then its construction of the will was more forced and unnatural than it has yet been asserted to be.

That the facts of the second paragraph of the certificate of the United States circuit court of appeals were not part of the special verdict in the Pennsylvania case, the opinion of Judge Acheson clearly shows. He says:

"The plaintiffs have introduced some evidence that was not, it seems, before the courts in the former litigation, with reference to the state of facts under which, as they allege,

the will of James S. Stevenson was made—facts which they contend are competent aids in construing the will, and call for a different conclusion from that reached by the supreme court of Pennsylvania. * * * But upon the question, whether the evidence here relied on warrants a different construction of the will from that adopted in *Mitchell, Admr., vs. Pittsburgh, Fort Wayne & Chicago Railway Co., supra*, we do not feel called upon to express an opinion." (See pages *16 and 17* of brief of plaintiffs in error.)

Counsel for defendants in error are grossly wrong in their statement as a fact that the only evidence upon which the finding of facts in the certificate as to the time and circumstances of publication was the register's certificate of probate, attached to the certified copy of the will. Of the facts set forth in paragraph 2 of the certificate of the court of appeals the affidavit of probate was proof only of that portion which states "*that on the 16th day of October, 1831, * * * the testator, though he had theretofore signed his will, first published the same in the presence of witnesses, whom he called to attest it, and a few hours thereafter died.*" (See opinion of Judge Acheson on page 17 of brief of plaintiffs in error.) That portion which states that such publication was made "*when confined to his room by sickness, and after a dangerous illness for two weeks preceding his death*" was based upon deposition of a witness, which Judge Acheson held to be satisfactory evidence. (See page 16 of brief of plaintiffs in error.) Such deposition was not taken until after the bringing of this ejectment suit in the circuit court of the United States.

There was absolutely no evidence whatever that at the time of making the will the testator was *in good health*. Such assertion is the figment of the imagination of counsel for defendants in error. There was not a scintilla of proof of any description, which, even by distortion, could be claimed to be the basis of such an unwarranted assertion.

The several cases, cited upon the brief of defendants in error, to show that this court should follow the construction of this will, made by the supreme court of Pennsylvania, are all authorities decided by this court before the decision by this court of *Burgess vs. Seligman*, and most of them will be found among the fifty or more cases referred to in the note to that case by Mr. Justice Bradley. There can be no doubt that the utterance by that Justice in that case is the late rule intended to be laid down by this court in reference to the duty of the federal courts to follow state adjudications, for at page 34 of the report of *Burgess vs. Seligman*, 107 U. S. 20, he said :

"As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail."

And at page 35 it was said :

"It can hardly be contended that the federal court was to wait for the state courts to decide the merits of the controversy and then simply register their decision ; or that the judgment of the circuit court should be reversed merely because the state court has since adopted a different view. *If we could see fair and reasonable grounds to acquiesce in that view we should gladly do so, but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion.*" (Italics are our own.)

It will thus be seen that in this case this court refused to follow the construction of a Missouri statute, made by the supreme court of that state subsequentty to the decision of this case by the circuit court of the United States, because this court was "*forced to a different conclusion*" as to the law, and affirmed the judgment of the circuit court.

Folsom vs. Ninety-Six, 159 U. S. 611, followed *Burgess vs. Seligman* as authority for this principle of the law, and so, as far as this court is concerned, this question seems effectually to have been put at rest.

The argument of the defendants in error, that the facts appearing in the second paragraph of the certificate of the United States Circuit Court of Appeals "*are wholly irrelevant as bearing upon the construction of the will*," is without merit.

These facts show that the testator, on the date of his death, a few hours preceding his death, and after a dangerous illness of two weeks, first published his will in the presence of witnesses. This certainly has a very important bearing upon the question of intention as to whether he expected the death of Amanda before his own death, and, therefore, whether he intended the gift over to the Barber heirs to provide against a lapse of her devise, if she died before him. It is unquestioned law that the court will receive evidence of a republication of a will to show, *ex gra.*, that a testator meant to devise after acquired real estate.

It seems to us that the case of *Stambaugh's Estate*, 135 Pa. 585, most effectually disposes of this branch of the case in favor of the plaintiffs in error. The following language of Chief Justice Paxson is a complete answer to the argument of defendants in error.

At page 596 he said:

"Is this a spendthrift trust? It may be admitted that it lacks some of the usual provisions of such a paper, notably the absence of any clause protecting the income from attachment, etc. If, however, we can gather from the will itself, and from the light of the circumstances surrounding the testator at the time he made it, that his intent was to

create a spendthrift trust, such intent ought not to be defeated because his conveyancer blundered. That he was an ignorant man appears from his signature, which was by mark only; that the conveyancer did not possess more than the average skill of a country justice of the peace, the will itself abundantly shows."

Again at page 597 he said:—

"Upon the face of the will it appears that Moses was indebted to his father, for it directs 'that all the just debts and claims that I have and hold against my son Moses Stambaugh,' shall be deducted from his share before it is placed in trust. Had the testator had confidence in his son financially, it is not likely he would have given this direction. The key to it is found when we turn to the evidence, where it appears that Moses Stambaugh failed and made an assignment for the benefit of his creditors a few months before the testator made his will. This throws a flood of light upon his intentions. He was providing for an insolvent son; and, in view of the circumstances surrounding him at the time, who can doubt that he intended this as a spend thrift trust? This intent is not to be set aside because it is not clearly expressed by his scrivener. It is said, however, that we must search only for the intent of a testator within the four corners of the will. This is true, but, when we come to consider the will and interpret its meaning, we must do so in the light of all the circumstances by which the testator was surrounded when he made it, and by which he was probably influenced. It was said by Justice SHARSWOOD, in Postlethwaite's App., 68 Pa. 477. "It has been long and well settled, and indeed it is a principle so consonant to reason that the only wonder is that it should ever have been questioned, that all the surrounding circumstances of a testator—his family, the amount and character of his property—may and ought to be taken into consideration in giving a construction to the provisions of his will.'"

In this case it will be found that the testator created in his will an active trust for his son, no more; the trustee was to hold the principal in trust, pay the annual interest thereon to the son, and after the death pay the principal "to the heirs of my son." The supreme court of Pennsylvania held the trust to be a spendthrift trust "*in view of the circumstances surrounding him* (the testator) *at the time*" (the testator made his will.)

It may be, as suggested by defendants in error, that this court is "bound to presume that when the question arose in the state court it was thoroughly considered by that tribunal, and that the decision rendered embodied its deliberate judgment thereon;" but it is respectfully suggested that such argument, embodied in the language of this court, is not applicable to this case. The official report of the opinion of the supreme court of Pennsylvania upon the construction of this will shows, at page 648 of Vol. 165 of Pa. State Reports, that counsel for appellees (defendants in error herein) were "*not heard.*" It must be a case very devoid of merit, indeed, which a court will decide without hearing argument of counsel on both sides. In view of the fact that counsel, opening the argument for appellants, expressly stated to the court that senior counsel for appellants proposed fully to argue that branch of the case, upon which the supreme court afterwards ruled against the appellant, it would have been a nearer approach to the even-handed dispensation of justice to have invited senior counsel for appellants to proceed, before hearing counsel for appellees. If counsel for appellants then had not succeeded in establishing to that court the merit of their case, refusal further to hear discussion of the case might have been proper.

Defendants in error endeavor to prove that the rule laid down by this court in *Britton vs. Thornton*, 112 U. S. 526, has never been the rule of the Pennsylvania courts. It will be remembered that in *Britton vs. Thornton* the devise over was upon the condition if A "*die in her minority, and without lawful issue.*" Following *O'Mahoney vs. Burdett*, in which the bequest over was upon the condition if A "*should die unmarried or without children,*" this court held that death of the first taker before the testator was not contemplated, and refused to hold the gift over to be merely substitutionory in character to prevent lapse. At page 32 of brief of plaintiffs in error the statement is made that no Pennsylvania authority, until the supreme court decision upon this will, had decided contrary to *Britton vs. Thornton* and *O'Mahoney vs. Burdett:* that assertion we can show to be absolutely correct. It is true that in Pennsylvania, New York and other states, where the death of the first taker is coupled with the circumstance of death without children, or without issue, the death has been construed to mean death within the testator's lifetime. As we have stated, this construction rests upon authority rather than upon principle (see page 38 of brief of plaintiffs in error). But in both *Britton vs. Thornton* and *O'Mahoney vs. Burdett* death of the first taker was coupled not only with death without issue, and death without children, but death *in her minority*, in the first case, and death *unmarried*, in the second case. We defy any one to produce a single authority, English or American, where death *in her minority*, or death *unmarried*, in connection with death without issue, or death without child, has not been construed as an intended death of the first taker *at any time*, and not merely before the testator's death.

Defendants in error with great confidence cite *Schoonmaker vs. Stockton*, 37 Pa. 461, to combat this assertion. At page 464 of the report it will be found that the gist of that decision was the fact that "*a complete distribution of the*

Plaintiffs in error do not rely on *Britton vs. Thornton* as in conflict with, and overruling, any settled rule of property in Pennsylvania; it is only in conflict with *Mitchell, admr., vs. Ry. Co.*, construing this will. We contend that *Mitchell., admr., vs. Ry. Co.* is unsupported by any authority, and that no one of the many cases cited on defendant's brief from page 24 and on, is authority for the decision of this case. Those cases are all undoubted law, but they have no application to this case, for the reason that the gift over is dependent upon death without issue, or death without heirs, or death without children; in none of them (*Schoonmaker vs. Stockton* excepted) was such death associated with *death in her minority*, as in *Britton vs. Thornton*, or with *death unmarried*, as in *O'Mahoney vs. Burdett;* or with *death unmarried, or if married*, as in the Stevenson will. We have discussed the case of *Schoonmaker vs. Stockton;* under its peculiar language and the testator's very apparent intention, it has no application here.

We contend that all the cases cited by defendants may be put in some one of the following classes:

I. *Where the prior devise, or bequest, is in technical and express language a fee simple, or an absolute gift, and there is a gift over upon death without issue, etc.*

Caldwell vs. Skilton, 13 Pa. 152;

Shutt vs. Rambo, 57 Pa. 149;

Karker's Appeal, 60 Pa. 141;

Mickley's Appeal, 92 Pa. 514;

McCormick vs. McElligott, 127 Pa. 230;

Morrision vs. Truby, 145 Pa. 540;

Stevenson vs. Fox, 125 Pa. 568;

King vs. Frick, 135 Pa. 575;

Biddle's Estate, 28 Pa. 59, a bequest of personalty: "I give to my daughter everything of which I die possessed"—sufficient to give an absolute bequest.

II. *Where realty and personalty are given by the same clause in the will and there is a gift over of both upon death without issue, etc.*

Morrison vs. Truby, 145 Pa. 547;

Coles vs. Ayers, 156 Pa. 197;

III. *Where the testator declares the scheme of his will to be to make a complete and equal distribution of his estate, real and personal, and there is a gift over to survivors of the shares of those dying without issue, etc.*

Schoonmaker vs. Stockton, 37 Pa. 461;

Fahrney vs. Holsinger, 65 Pa. 388;

Fitzwater's Appeal, 94 Pa. 141.

The supreme court of Pennsylvania decided in the cases of *Thornton vs. Krepps*, 37 Pa. 391, and *Britton vs. Thornton*, 25 Pgh. L. J. 158, that the will of Joseph Thornton devised to Eliza Ann Thornton a fee simple subject to an executory devise. Mr. Justice Gray followed the supreme court of Pennsylvania in that ruling. The question raised and decided in this court was not raised in the Pennsylvania courts, viz: that the testator did not contemplate the death of Eliza Ann before his own death.

Britton vs. Thornton, 112 U. S. 526.

In the latter case this court passed upon both branches of the case and held that where "*the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect * * * * upan death * * * * at any time, whether before or after the death of the testator*," and also

that Eliza Ann's "*title under the specific devise was defeated by her dying under age and leaving no issue surviving her.*"

The first proposition was raised by the learned counsel for plaintiff in error. It is submitted, therefore, that the determination of that proposition was necessarily incumbent upon this court, before consideration of the second proposition would be necessary.

It will be noticed also that the Thornton will was made since the act of 1833 and that Eliza Ann was charged with the payment of an annuity. These were implications of a fee, which are not in this case.

112 U. S., 532.

whole estate was intended ;" some of the shares were payable in money, and as no life estate, or its equivalent, was intended as to the money, such intention cannot be inferred as to the land ; and so, to effectuate the paramount intention of the testator to accomplish an equal and complete distribution of his estate, the court held that absolute estates in both land and money were intended, and ignored the word *unmarried* in order to effectuate such paramount intention. In *Britton vs. Thornton*, *O'Mahoney vs. Burdett*, and in this case the first limitation of the will was to one, and only one, devisee or legatee, and the limitation over to secondary devisees or legatees was only of the property (not realty and personalty in the same will), given to such single devisee or legatee by the primary limitation. Nor was there in these cases a gift of both realty and personalty to the first taker with a gift over thereof to secondary takers upon death of the first taker upon certain conditions. In *Schoonmaker vs. Stockton* the testator gave land to some children, and personalty to others, and in so doing endeavored to make the benefit to each child equal to that of every other child ; then he directed the shares of all who died unmarried or without issue to revert to the general estate. The court held that a devisee took a fee simple title to the land, and said :

"He makes the division equal, and if he had failed to create more than life estates, each would have a life estate by the will, and the reversion by descent, which together would be the fee of the whole. This was not the intention."

This case does not militate against either *Britton vs. Thornton* or *O'Mahoney vs. Burdett*, because the circumstances are different. The latter case also expressly ruled that *the inconvenience of suspending the absolute vesting of the gift during the whole lifetime of the legatee could not control the natural meaning of the terms of the bequest.* This seems effectually to dissipate some of the false reason-

ing to the contrary of the supreme court of Pennsylvania in this case. (See page 13 of brief of plaintiffs in error.)

It is impossible to apply *Schoonmaker vs. Stockton* as a decision for this case. The intention of the testator, as gathered from the whole will in that case is so different from the testator's intention in this case, and the circumstances are so different, that it requires a large measure of assurance to claim that that case "furnishes us with a full and precise precedent for the decision of the supreme court upon the will in this case."

We contend therefore that the rule laid down in *O'Mahoney vs. Burdett* is, and always has been, the law in Pennsylvania, viz :

"*There is no authority that the words introducing a gift over in the case of the 'death unmarried or without children' of a previous taker, do not indicate, according to their natural meaning, death unmarried or without children at any time, or that the ordinary and literal meaning of the words used is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper.*"

The case of *Mickley's Appeal*, 92 Pa. 514 did not rule, according to defendants contention, that *O'Mahoney vs. Burdett* is not law in Pennsylvania. Counsel for appellants therein urged upon the supreme court that it was upon *death* merely of the first taker that a gift over was regarded as substitutionary, and that a gift over upon *death without issue* was never held to be merely substitutionary, but was held to take effect upon death at any time. It was the English decisions, recognizing such distinction which Justice Sharswood said "were not of authority with us."

In every other case, cited by defendants in error, the substitutionary clause of the will was to take affect upon death without children, merely.

In no case was such death joined with the additional circumstances of death *unmarried*, or death *under age*. Defendants have failed, therefore, to demonstrate that the rule of *Britton vs. Thornton* and *O'Mahoney vs. Burdett* is not applicable to the determination of this case, where the devise over is dependent upon the circumstances of death *unmarried*, or if married death *without offspring*.

Defendants in error contend that it is a fact that in the Middleswarth case the testator *explicitly directed* that after the death of Jonathan without issue, his executors, or the survivor of them, should sell the property devised to Jonathan, and divide the proceeds of sale. It will be noted that the testator directed as follows:

"That in case my son Jonathan shall die without leaving any legitimate issue, then * * * * the real estate * * * shall be sold, and after the payment of all the specific sums hereinbefore mentioned, which is enjoined on him to pay, then it is my desire and will that of the balance remaining, one thousand dollars shall be paid by my executors, or the surviving ones of them, to the foreign missionary society * * * * * * * and the balance remaining after this * * * * to be equally divided amongst all my legitimate grandchildren."

The will merely directed that the real estate *shall be sold*. By whom? The will does not say, but the law says by the executors. Who does the will direct shall make payment of the specified sums before mentioned and enjoined upon Jonathan to pay? By whom does the will direct that the *balance remaining* of the proceeds of sale shall be *equally divided amongst all my legitimate grandchildren?* The will is silent in these particulars. It says only that of this balance $1,000 shall be paid by the executors to charitable

purposes. So it will be seen that there is no *explicit direction* to the executors *to sell* the real estate, and no *explicit direction* to the executors *to divide* the proceeds of sale, except in the one instance of the payment of money for charitable purposes. There is no *explicit direction* to the executors to divide the proceeds of sale after they had paid the said sum of $1,000 to charity.

It is submitted that had the will of Moses Middleswarth contained an *explicit direction* that the executors should sell the real estate, devised to Jonathan, the provisions of section 12 of the Act of February 24, 1834, would not have applied, when the executors should undertake to make the sale.

That section provides as follows:

"All powers, authorities and directions, relating to real estate, contained in any last will, and not given to any person by name or by description, shall be deemed to have been given to the executors thereof; but no such power, authority or direction shall be exercised or carried into effect by them, except under the control and direction of the Orphans' Court having jurisdiction of their accounts."

Purdon's Digest (12th ed.) 587, pl. 92.

The provisions of the above act respecting those in whom should reside the duty of executing the power of sale in the will, were but declaratory of the common law as it stood before the passage of the act.

Lloyd vs. Taylor, 2 Dallas 223;
Silverthorn vs. McKinster, 12 Pa. 67, 71.

It is submitted that the executors of the Middleswarth will, in executing the power of sale therein, and the executors of the Stevenson will, if they had been called upon to execute the power of sale therein at a time subsequent to the date of the above statute, would have been required to petition the Orphans' Court for an order to sell the real

estate and to give security for the faithful application of the proceeds of sale. No careful real estate lawyer would have permitted a purchaser to take the real estate without such Orphans' Court proceedings. And it is a matter of interest to know that such proceedings were actually had in the Middleswarth estate by the administrator with the will annexed after the supreme court of Pennsylvania had decided that he could recover in ejectment the land devised to Jonathan. Now the Stevenson will upon this phase of it rests on all fours with the Middleswarth case. Had the administrator with the will annexed recovered as plaintiff in the suit of *Mitchell, Admr., vs. Pittsburgh, Fort Wayne & Chicago Railway Co.*, he could not have made title to the lots here in controversy without an order of the Orphans' Court of Allegheny County.

The principle that a devise over of a power of sale after a failure of issue is presumptive that the testator intended a definite failure of issue, has been developed by a succession of several cases in this state. The *Taylor* case contained an *explicit direction* to the testator's executors, or the survivor of them—a direction by *description*—to make the sale and the supreme court, in reversing the lower court, held that this was indicative of a definite failure of issue because "*it was to be done during the lifetime of his executors or the survivor.*"

In the Middleswarth case, with the direction to sell in the terms above indicated, the supreme court, in reversing the lower court, held that the direction to sell restricted the failure of issue, because "*it manifestly indicates that this failure will occur during the lifetime of some one of his executors named.*"

It is confidently suggested that in reaching the conclusion it did, the supreme court must have considered it immaterial whether there was an *explicit direction to the executors to sell*, or whether there was merely an *explicit*

direction that the real estate should be sold. The court read into the will, what the common law always had implied, and what the act above cited expressely enacted should be the law,—that the executors should exercise the power and direction in the will.

Snyder's Appeal set at rest any question as to the merits of the decision in the Middleswarth case, and expressly stated the two salient and controlling features of the Middleswarth case, to be:—*the direction to sell* and *the direction to divide.*

In the case of this (the Stevenson) will the supreme court again gave utterance to what had all along been the proper principle in such cases by declaring that "*a power of sale without limit would doubtless be bad, under the rule against perpetuities, and a testator will not be presumed to have intended anything so absurd;*" and that, therefore, the idea of an intended exercise of the power of sale after an indefinite failure of issue "*may at once be dismissed as too remote.*" (See pages 69 to 73 of brief of plaintiffs in error.)

Defendants had made in the supreme court of Pennsylvania the precise argument, and sought to draw the same distinctions, which are now urged by them in this court, and the above abrupt dismissal thereof is strong evidence of the want of merit in the position they now urge.

So the counsel for defendants in error have struggled in vain to take this case out of the rule laid down in the *Middleswarth* case, reiterated without qualification in the *Snyder* case and applied by the court in our own case.

It is laboriously argued by defendants' counsel that, according to their conception of this case, there are "four considerations which the court found within the four corners of the Middleswarth will, plainly indicating the intention of the testator to refer to a definite failure of issue upon the part of the first taker, and no one of which can be found in the Stevenson will."

We have succeeded in proving that the Middleswarth will and the Stevenson will exactly coincide in two particulars, to-wit:

(*a.*) The direction that at the death of the devisee, upon failure of whose issue the estate is given over, the real estate devised shall be sold.

(*b.*) The direction that the proceeds of sale shall be distributed amongst a class of persons whose parent is elsewhere recognized in the will as being alive at the date of the will.

These alone were regarded as the *controlling features* in the Middleswarth case; and are sufficient of themselves to control in the Stevenson case.

Counsel for defendants argue that there were two other reasons in the Middleswarth will, not present in the Stevenson will, which preponderate against the plaintiffs in this case. With like reason counsel for plaintiffs might retort that there are three features in the Stevenson will, just as indicative of a definite failure of issue, which were not present in the Middleswarth will, and which preponderate more against the defendants than the two reasons they suggest. These are:

(*c.*) The fact that testator had in mind the contingency of Jonathan's death before all the legacies given to the testator's children had become due, or had been paid out of the residuary estate devised for the purpose.

The court said that "the intention to refer to a definite failure of issue was *further* shown" by such fact.

But is this fact any stronger reason for such construction than the fact that James S. Stevenson made the devise over dependent upon the condition

(*c.*) of Amanda "dying unmarried, or, if married, dying without offspring by her husband?" Both conditions are matters personal to the devisee.

(*d.*) The testator in the Middleswarth case was said to have had in mind his immediate grandchildren, and excluded the idea of a more remote future, by forever debarring from the distribution such grandchildren as might be guilty of certain enumerated sins.

The court said that this "*again*" showed that the testator had in mind a definite failure of issue.

But is this fact any more conclusive of such intention than the fact, present in the Stevenson will, that the testator used the words,

(*d.*) "*in the event*" of Amanda's death, in the sense of *at* or *upon* Amanda's death. We do not attempt to establish a forced and unnatural construction of these words. As demonstrated upon pages 88 to 93 of brief of plaintiffs in error, the words "*in the event of*" by reasonable intendment of the testator mean *at* or *upon*, and by imputing such meaning to them, we bring our case within the well established rule that a definite failure of issue is intended from the use of such meaning of the words.

This exhausts the "*four considerations*" from which a definite failure of issue is to be inferred. The Stevenson will has not suffered thus far by comparison with the tests set up by the Middleswarth case. Plaintiffs, moreover, urge an additional reason or indicium, which is present in the Stevenson will, and absent from the Middleswarth will, in favor of a restrictive construction of the failure of issue, viz:

(*e.*) "Then," was used as an adverb of time. The argument on pages 93 to 95 of brief of plaintiffs in error upon this branch of the case is full, and counsel for defendants in error have urged no satisfactory reason against such meaning.

The suggestion of Judge Ewing and of Judge Acheson that the *Middleswarth* case does not furnish a rule for the decision of this case, seems to be without foundation, as no

reason for distinguishing this case from that case has been suggested by either of those judges.

It is respectfully submitted, therefore, that if the *rule of preponderance* is to be applied in the decision of this case, as is suggested by the method of argument used by counsel for defendants in error, the plaintiffs have succeeded in establishing their right to a judgment in their favor on the construction to be applied to the language of this will.

In *Taylor vs. Taylor*, 63 Pa. 461, the decision of the court was placed upon the *implication* of a definite failure of issue, just as much as upon the *expression* of it. The court said that if it appear *either* by expression *or* by implication that "issue" meant issue living at a particular period, and not the whole line of descendants, it should have the restricted sense; and the court further said that in that will such intention appeared both expressly and impliedly. *Expressly* for the reasons defendants set forth in their brief; and *impliedly* from the direction to the executors to sell the land and divide the proceeds of sale.

In the case of *Fahrney vs. Holsinger*, 65 Pa. 388, at page 393, it was said that in *Taylor vs. Taylor* the "*devise over to testator's executors to sell and divide the proceeds after a failure of issue of the first taker indicated clearly that the testator intended a definite failure of issue.*"

The latter declaration is significant, because made by Justice Sharswood, who wrote the opinion in both cases. He was certainly well qualified, therefore, to know the grounds of decision in both cases.

The case of *Criley vs. Chamberlain*, 30 Pa. 161, cited by defendants in error as "*an absolute answer*" to a portion of the argument of plaintiffs in error, is no longer an authoritative decision in Pennsylvania. The judgment of the common pleas court was affirmed by the supreme court in a brief *per curiam* opinion without discussion of the merits of the case. The supreme court has repeatedly said that a *per curiam* opinion is not authority for future decision. The common pleas judge in opinion did not discuss the effect of the power of sale given to the "*executors, or the survivor of them,*" to be exercised upon the death of the first taker "*without leaving lawful issue.*" The argument of counsel did not urge that point upon the supreme court. The common pleas judge followed as a decisive precedent the case of *Middleswarth vs. Collins*, 1 Phila. Rep. 139, decided in 1851 by the district court of Allegheny County, and constructive of the will of Moses Middleswarth, which was in 1873 construed otherwise by the supreme court of Pennsylvania in the case of *Middleswarth vs. Blackmore*, 74 Pa. 714. *Middleswarth vs. Collins* declared the rule to be that "a devise to A, or to A for life, or to A and his heirs, with a subsequent clause devising over, on A dying without leaving issue, has always and invariably been construed as, of itself, creating an estate tail. A devise over on A dying without leaving issue has, without almost an exception, been construed as imputing an indefinite failure of issue, unless there is something in the character of the devise over, that demands an implication of a failure of issue within a definite period." After thus stating the rule to be followed in that case, the court made the statement of its conception of the essence of that case thus:

"The only question in this case, therefore, is, does the subsequent devise over, for the benefit of missions and for the benefit of the grandchildren, show an intent to limit the failure of issue to a definite period?"

Wynn vs. Story, 38 Pa. 166, does not furnish a rule for this case. It provided that if the devisee "*shall die leaving no such lawful issue*," then all the property, both real and personal, that should remain at his death, should "be sold * * * and the money arising therefrom shall be disposed of in the following manner, hereafter directed." The report of the case does not state among whom the division of money should be made. The argument of the learned counsel for plaintiff in error did not raise the question, whether the power of sale in the will operated to restrict the failure of issue, nor did the supreme court of Pennsylvania notice that point; but the sole contention was as to the effect of the word "*leaving*," and the court ruled that in case of devises the word *leaving* had no restrictive force. Our criticism of the case of *Criley vs. Chamberlain* in a large measure answers this case.

Middleswarth vs. Collins was decided in 1851;

Criley vs. Chamberlain in 1858;

Wynn vs. Story in 1861;

Taylor vs. Taylor in 1870;

Middleswarth vs. Blackmore in 1873; and

Mitchell, admr., vs. Ry. Co. in 1895.

In the first three cases the effect of the power of sale was not argued by counsel, and was not noticed by the courts. In the last three cases the point was raised by counsel, and the court in every case held that the power of sale was restrictive in effect, and reduced the failure of issue to a definite period.

Fahrney vs. Holsinger, 65 Pa. 388, 393, decided in 1870, and

Snyder's Appeal, 95 Pa. 174, 181, decided in 1880, expressly recognized the rule laid down in the last three cases

The court held that the devise was in fee tail.

It will thus be seen that the effect of the power of sale in the will was considered neither by counsel nor the courts. More than twenty years afterwards the supreme court of Pennsylvania held that the devise to Jonathan in the Middleswarth will was not in fee tail, but was a defeasible fee with a good executory devise over. So that while the case of *Middleswarth vs. Collins* was not itself reversed, yet its reasoning and its interpretation of the will of Moses Middleswarth were emphatically overruled by *Middleswarth vs. Blackmore.*

It is an interesting fact that the case of *Criley vs. Chamberlain* has been subsequently but twice cited by the supreme court of Pennsylvania in reference to this principle of construction, and in both instances it has been distinguished or qualified, so as not to be followed. First in *Taylor vs. Taylor*, 63 Pa. at page 486, it was said in answer to the argument that that case was decisive of the Taylors case:

"*Criley vs. Chamberlain,* * * * *is relied on to sustain the same point, but there the first limitation was in fee, and the case has no application.*"

And again in *Middleswarth vs. Blackmore*, 74 Pa., at page 420, it was said:

"The cases of * * * *and Criley vs. Chamberlain, supra, are urged as leading to a different conclusion. Each of these cases was decided under its peculiar circumstances. Neither of them denies that if the whole will clearly indicates a different intention, full effect shall not be given to such intention.*"

So it will be seen that the two times it has been brought to the attention of the supreme court as decisive authority, that court has refused to follow it as authority.

If *Criley vs. Chamberlain* has not been qualified or overruled, it is difficult to see why it was not followed in *Taylor vs. Taylor* and *Middleswarth vs. Blackmore*, because it certainly seems that the cases are alike in their chief features.

In *Taylor vs. Taylor*, where there was in the first instance a devise to the first taker for life with remainder to her issue if she had any, and if she died without issue, then the power of sale was to be exercised, the court refused to follow *Criley vs. Chamberlain*, because therein "*the first limitation was in fee, and the case has no application.*" Surely a case so willingly avoided and distinguished by the court is a very questionable authority, and, if not overruled, is an authority only for "*its peculiar circumstances*," as was said in *Middleswarth vs. Blackmore*. In the Stevenson will the first limitation in the devise to Amanda contains no words of inheritance as ditl the same devise in *Criley vs. Chamberlain;* neither was it for life as in *Taylor vs. Taylor*. If *Criley vs. Chamberlain* was not an authority in the Taylor case, how can its application be invoked in this case?

It is still confidently maintained that the meaning of "*heirs of John Barber*," contended for on pages 75 to 78 of brief of plaintiffs in error, is the only rational sense of the words. *Children* of John Barber were intended to take. Had the testator used *heirs* in its technical sense the gift would have been void for indefiniteness. The suggestion of defendants in error that testator intended a division *only after John Barber's death*, and then among his heirs whoever they might be, is open to just censure and ridicule. Suppose that Amanda had died immediately after the testator, the devise over would have been good undoubtedly as an executory devise because she would have died unmarried, and it would have been the duty of the executors to sell the

In *Eichelberger vs. Barnitz*, 9 Watts 447;

Robinson's Estate, 149 Pa. 418;

Lawrence vs. Lawrence, 105 Pa. 335; and

Reinoehl vs. Shirk, 119 Pa. 108, the devise, in every case introduced by a word of contingency, was followed by the conclusion "then," and, of course, the latter word could not be held to be an adverb of time, but was rather a particle of reference: it could be nothing else. In none of these cases, however, was the nature of the word "*then*" considered.

lots forthwith. And suppose that John Barber had survived the death of Amanda and not died until 1868 (the true date of his death). Then, upon theory of defendants in error, distribution of the proceeds of sale could not have been made, because it must be delayed for thirty-six years until John Barber's death should result to determine who were his heirs. These plaintiffs, and the ancestors of such as are now dead, could not take under that denomination, because "*there can be no heir of a living person.*" Such construction is *sticking to the bark*, and is intolerable. In the residuary clause of the will testator constantly uses *heirs* in the sense of children, by bequeathing portions of the residue of his estate to James Wright, *or his heirs;* to the *heirs* of John Barber; to the *heirs* of James Wright. In the devise of certain lots to John Barber and "*to* his heirs" the testator may well have intended his children to take as purchasers, though it is not here contended that such words would not be construed to be words of limitation.

It cannot be denied that there is in the Stevenson will a wealth of indications that the testator had in mind a failure of the issue of Amanda at the period of her death. If the rule of universal application is to have reasonable effect here, that courts seize upon any circumstance or expression in the will, however trivial, which will confine the generality of the expression, *dying without issue*, to the death of the first taker, then such a reasonable and effective meaning must be given to some one of these several *indicia* that the failure of issue will be restricted to a definite time. This will has been construed by three courts and as many opinions have been filed. No two opinions agree in the construction to be applied. Two of the opinions are diametrically opposed to each other in reasoning upon every phase of the case. The will is not complex in language, structure

or ideas; it is a plain perspicuous will and contains within its four corners a statement of every fact and such sufficiency of language that its interpretation should be a work of facility. The effort of the courts seems, not to have been to discover the testator's meaning, and to effectuate it; but rather to bring to bear some unbending precedent, the blind application of which results in the defeat of the testator's manifest purpose. It is unnecessary here to reiterate the *indicia* in this will favoring a definite failure of issue; but it is not to be denied that they vastly outweigh the indications in any one will, cited upon the brief of plaintiffs in error, which have been held therein to be sufficient to infer a definite failure of issue. If this be not true, then it is impossible to say what abundance of indications must appear upon the face of a will, to prove that the testator did not mean a death without issue of the first taker at a remote period in the future. But this cannot be, because courts "*catch at straws*", in order to find some word or thing in the will, which will restrict the failure of issue to a definite period. We find the courts seizing upon such accidental words as "*behind him*" in *Porter vs. Bradley*, 3 Term Rep. 143; "*living William*" in *Pells vs. Brown*, Cro. Jac. 590; a gift over to "*survivors*" in *Abbott vs. Essex Co.*, 18 How. 202 and in *Cameron vs. Coy*, 165 Pa. 290; and by forced distinctions giving effect to them in order to avoid construing the devise to be an estate tail. This court has in two cases held that if the first taker die in her minority and without issue the failure of issue is definite: *Barnitz vs. Casey*, 7 Cranch 456 and *Britton vs. Thornton*, 112 U. S. 526.

On the very day upon which the supreme court of Pennsylvania decided this case they decided another case where the gift over was "*if either Hugh or Martha should die leaving no issue, then their estates shall descend equal shares alike to the two married sisters and Hugh or Martha, or survivors, that is the three survivors of the four shall*

have equal shares alike of said estate or estates," and held not that the gift to the first takers was of an absolute estate and the gift over was intended to take effect only by way of substitution to prevent lapse, but found no trouble in saying that, if the will was open to question, there would not be much difficulty in reaching the conclusion that testator had in mind a definite failure of issue.

Cameron vs. Coy, 165 Pa. 290.

It is impossible to see how these two rulings, made by the same court, but by different judges, and on the same day, can be reconciled.

Eichelberger vs. Barnitz, 9 Watts 447, the leading case in Pennsylvania upon this branch of the law, is not authority for the decision of this case. It was applied as authority by the circuit court. It will be found that the supreme court therein decided the case as if there was a devise over upon a mere failure of issue without more. The word "*unmarried*" did not control the devise; the court said that "*because my son Henry is unmarried*" was the reason why the testator made the devise and that he limited the devise at the same time merely to his "dying without leaving issue."

In that case there was no power of sale and no other indication of an intention to restrict the failure of issue, which abound in this will. How can such a case, devoid of all restrictive indications, be a rule for this case?

This case comes within that class of cases of which *Langley vs. Heald*, 7 W. & S. 96, is the pioneer, and which is the leading case in Pennsylvania upon the particular branch of the law of this case.

There the testator devised land in fee to his son and *if he die and leave no lawful issue*, then to testator's *daughter, if she shall be then living, and to her heirs and assigns forever.* The supreme court said that the word "then" re-

ferred to the death, and the period contemplated was whilst the daughter was living.

But why multiply authorities? The language of this will is so plain as to need no precedent as an aid to interpretation

We have a testator over fifty years of age, devising lots to an infant girl of five years of age. The language throughout the whole will is perspicuous and logically and thoughtfully connected; there are no involved or cloudy sentences; the testator has not attempted the use of, and has not misapplied, technical terms. The testator clearly expresses a desire to make a distribution of his estate, to become effective at the time of his death; he then devises the lots to Amanda and provides that if she die unmarried or married without offspring by her husband, the lots shall be sold and the proceeds of sale divided amongst a class of persons of whom are some of the plaintiffs; he makes other specific devises, without gifts over in case of any of them; he then directs the residue of his estate to be converted into money and divided amongst beneficiaries named. All these provisions are clothed in clear, brief and emphatic language. No one knows when the will was executed. The apparent date of execution was on March 11, 1831. No one knows the condition of testator's health at the date of the will; it is not in this case. No one knows what his expectation of a long life then was. But while we are in ignorance of these matters, we do know by exact and uncontradicted proof that when the will was first published the testator had been seriously ill for two preceeding weeks, and that he died a few hours after such publication. He then published his will in expectation of immediate death. No other sensible presumption could arise. It is a most unwarranted and improbable construction to say that he ever contemplated the possibility of Amanda's death before his own. It is almost as certain that he never con-

templated an indefinite failure of issue. What testator, a layman, understands the term *indefinite failure of issue?* Who expects that from the use of the term "dying without issue" in his will, the law will impute him to mean die without issue one or several hundred years after the exact period of death of the first taker? Testator used no expression which by frequent interpretation has had impressed upon it a fixed legal meaning. It is undoubted truth that he meant a failure of offspring of Amanda on September 21, 1891, the date of her death, and not a failure thereof on September 21st, 1991. Is it sensible to suppose that he thought that she could *die* without offspring upon the latter date? The application of the rule in such way that he is supposed to have intended the latter date, operates not to the ascertainment of his intention, but to the defeat of it. "Issue" by established usage and frequent interpretation has come to mean "*heirs of the body;*" but *offspring* is an unusual word in wills, and therefore has not acquired a fixed legal sense. Offspring in its popular sense means *young* or *children*, and "offspring by her husband" can have no other sense than *legitimate children.* It is hardly to be supposed that the testator intended to provide against illegitimacy down the whole line of Amanda's issue to infinity.

The argument of defendants in error that Amanda, having married and having had offspring by her husband, has performed all the conditions required of her by the testator, and by so doing her estate has ripened into an absolute fee simple, is without merit. This is the first time that such argument has been urged by defendants, and coming this late in this long drawn out litigation, after this case has been argued exhaustively before four courts, one is reminded of the desperate man catching at straws. If there was

merit in this suggestion, we think that argument would have been urged before and pressed with more confidence than defendants in error have evinced in their brief before this court. Plaintiffs in error seek not to read into the devise to Amanda the word "*living*" or "*surviving*" in association with the offspring of Amanda for the purpose of avoiding this argument.

We have argued that if we succeed in establishing to the satisfaction of this court that the testator contemplated a definite failure of issue of Amanda, then, in order to express exactly the testator's meaning, one or the other of such words must by implication of law be read into the will. On page 59 of brief of plaintiffs in error in the quotation from the case of *Booker vs. Booker* will be found the following:

"*It becomes, therefore, a matter of the greatest importance whenever these words 'dying without issue,' are used, to understand what they mean, whether they mean a dying without issue living at the death of the first taker, or whether they mean a general or indefinite failure of issue.*"

And in *Taylor vs. Taylor*, cited upon pages 69 and 70 of brief of plaintiffs in error, although the primary devisee then had no issue, the supreme court of Pennsylvania adjudged that there was a definite failure of issue with a "*limitation over in the event of her dying without issue living at her death.*"

The same thing is said in the quotation of Chief Justice Savage in the case of *Patterson vs. Ellis*, on page 62 of brief of plaintiffs in error.

Innumerable instances of the same sort might be cited. It is significant that the *dicta* of the courts are all the same way.

Had the testator intended that the *having* by Amanda of offspring by the husband should render the title to the

lots indefeasible, he would undoubtedly have said so. His failure so to say is strong reason to prove that he intended no such construction to be put upon the will. Plaintiffs in error have always contended that there is sufficient in this will, in conjunction with the evidence in this case, offered for the purpose of proving such fact, to infer that Amanda was the illegal daughter of the testator. If she was such illegal daughter, testator manifestly did not intend that the mere birth of a child should render absolute in Amanda the title to the lots. On pages 55, 56 and 57 of brief of plaintiffs in error we have argued at some length that testator could not have intended Amanda to have an absolute estate in any event. He explicitly provided that as long as she remained *unmarried* the title to the lots should remain defeasible; and if she *married* they were still to remain defeasible. If so, is there anything in the will to show that the mere birth of issue was to render the title indefeasible?

The issue might die immediately after its birth, and under such construction the estate in Amanda would become absolute, and the gift over would fall, though as long as she remained without issue born the estate in Amanda would continue indefeasible, and the gift over might become good. Is it probable that testator intended the devise to Amanda to become absolute upon her mere having children, or the devise over to the Barber heirs to become effective merely upon her not having children? Is it not more reasonable to suppose that he intended these respective devises to be dependent for their efficacy upon the conditions existing at Amanda's death? Is it probable that having provided that mere marriage should not make absolute the estate, he should intend that mere birth of issue should make it absolute? He nowhere states in the will that the having of offspring is to vest the estate in Amanda absolutely, or is to defeat the gift over to the Barber heirs. Had he said that in the event of Amanda dying without *having* offspring then over, there

would be a question whether the birth of issue would fulfill the condition in the will. The usual sense of dying without issue is *dying without issue living.* People constantly speak of one's dying without estate, as meaning the not having property at the time of death, regardless of what one's good fortune may have been long before death. We hear the expression that one has died without heirs, as meaning that at the time of death he has died without leaving those capable of inheriting, regardless of whether he had numerous heirs apparent in his life time. And so we find this well marked distinction drawn by the cases: that *death without issue* means *death without leaving issue;* and *death without having issue* means *death without having had issue.* This is giving to the words employed, when standing by themselves, their usual and natural meaning, as well as their technical sense.

In *Theobald on Wills* (2d ed.) 553, it is said: "The words 'without having any child' may be construed as equivalent to 'without having had' any child.

But the words 'without any children' mean without children at the death."

In *Pinbury vs. Elkin*, 1 P. Williams 563, Lord Chancellor Parker said that the words "dying without issue" had several senses; as *first*, a *legal* sense when there was a failure of issue of a tenant in tail so as to entitle the remainderman or reversioner to a *formedon* in remainder or reverter, which is whenever there is a failure of issue of the body of tenant in tail.

Secondly. Another sense of dying without issue was, if the party died *without ever having had issue.* * * *

Thirdly, but by the third sense of a person's dying without issue, is intended *without leaving issue at the time of his death,* and in this sense the words "dying without issue'

shall be taken in the principal case, which indeed seems to be the natural meaning of these words.

This language was quoted in *Snyder's Appeal*, 95 Pa. 177, 178.

In *Paterson vs. Ellis*, 11 Wend. 292, Chief Justice Savage said:

"Both expressions, viz: *dying without issue* and *dying without leaving issue* are considered, as in truth they are, of exactly similar import."

A gift over in case of a prior devisee or legatee dying *without children* means without leaving children at his death. But *without having children* means without having had a child. The first legatee's interest, *in the latter case*, becomes indefeasible on the birth of a child.

O'Hara on Construction of Wills 291.

In *Hughes vs. Sayer*, 1 P. Wms. 534, a testator bequeathed personalty to A and B, and upon either of them dying without children, then to the survivor; and if both should die without children, then over. The report of the case does not show whether A and B ever had children, but it was held by the court that "*the testator must be intended to mean a dying without children living at the death of the parent, consequently the devise over good.*"

The words *without having children* are construed to mean, as they obviously import, without *having had* a child.

2 Jarman on Wills (5th Am. ed.) 765.

In *Jeffreys vs. Conner*, 28 Beav. 328, a testator devised certain real estate to his son Charles, and certain other real estate to his daughter Eliza, "but if my said daughter shall depart this life unmarried before my son Charles" then over to Charles and Elizabeth, a niece of testator: "if my said daughter shall marry and have any child or children" then her part or share over to such child or children; "*if my son*

Charles die without having any child or children" then all the real estate left to him over to Eliza and Elizabeth; and should Charles and Elizabeth die "without any child or children" then all the property over to Elizabeth.

Testator died in 1830; Eliza died a spinster in 1851; Elizabeth married and died in 1855, without having had issue; Charles had had several children, none of whom were living at the time of this suit in 1860.

It was insisted on behalf of Charles, the plaintiff, that "the words '*die without having child or children*' are always construed as meaning '*without having had a child*' * * * * The gift over, '*should my son Charles and daughter Eliza die without any child*,' being symmeterial with the former gift over, the court, in favor of absolute vesting, will construe it in the same way, namely, as dying without having had a child. That can never take place, and the plaintiff is also entitled absolutely to the moiety of the daughter's legacy."

Sir John Romilly, Master of the Rolls, held that "*children*" meant "*issue*," because the context of the will required such definition, and said:

"The only way of cutting the knot is to hold that dying 'without having any child or children' means 'without having had any child,' and that 'dying without any child or children' means 'dying without any child or children living at the death.' It is a very capricious disposition on the part of the testator, but if he has thought fit to do so, I should be making a will for him if I were to alter it; besides there is this difficulty: Must I alter the first clause to make it agree with the second, or the second to agree with the first? The only way is to give effect to each clause as if it were by itself. He has said, 'if my son, Charles, die without having any child or children'; that cannot take place, because he has had a child, and, therefore, that gift over does not take effect. He goes on, 'and should my son Charles

and daughter Eliza die without any child or children', then over. Eliza has died unmarried, and Charles may die without leaving a child surviving him, and if he should, the gift over takes effect, as to the 'whole of the houses and property.'"

In *Thicknesse vs. Liege*, 3 Brown's Cases in Parliament 365, a testator devised the residue of his estate to his daughter for life, and after her death, to be equally divided among her children, when the youngest should attain twenty-one. *But if the daughter happened to die without any child*, or the youngest should not arrive to twenty-one, and none of them should have left issue, then over. At the time of testator's death the daughter had one child, six years old, who subsequently had four children, but they as well as their mother, all died in the lifetime of the daughter, so that she died without leaving issue at her death; and it was held that the gift over took effect.

It was objected by counsel in that case, as it is in this case, that "to add the words *living at her death*, some intent must be collected from the will, as a ground for it," but the court held against this argument.

In *Hedges vs. Harpur*, 3 DeGex & Jones 129, testator bequeathed to each one of his daughters an annuity, payable half yearly during their lives, and "after their respective decease," he gave the same to their children, and in case any or either of said daughters should die without issue, then such annuity to cease and fall into the residue of his estate.

Held, that on the death of the daughter, who had had issue, but left none living at her death, the capital of the fund producing her annuity fell into the residue.

Recognizing the distinction between *dying without* and *dying without having*, we find that in *Weakly vs. Rugg*, 7 Term Rep. 322, where leasehold property was bequeathed

to A, and "in case she died without *having* children," then over; it was held that the legatee's interest became indefeasible on the birth of a child.

And in *Wall vs. Tomlinson*, 16 Vesey 413, a residue was given to A "in case she should have legitimate children in failure of which," over, was held to belong absolutely to A on the birth of a child, who died before the parent.

So, giving to the words "dying without offspring by her husband," their natural meaning, we have the exact intention of the testator to be thus expressed: *in the event of Amanda dying unmarried, or if married dying without leaving offspring by her husband*, then over. Amanda did not die *leaving offspring by her husband*, and thus the gift over could, and did, become effective.

At common law, before the statute *de donis conditionalibus*, where there was a gift to one and the heirs of his body, or his issue, the donor was supposed to intend to perpetuate the property in the family of the donee. The English courts, being averse to perpetuities, construed such gift as a conditional fee; if the donee died without ever having had such heirs or issue, the land would revert according to the condition implied in the gift; if he had such heirs, or issue, the estate became absolute by the performance of the condition, for certain purposes, of which one was to enable the donee to alien the land, and thus bar his issue of the inheritance and the donor of the reversion. This the donee was in the habit of doing, and after purchasing the land back, he held it in fee simple absolute. The nobility were displeased with the action of the courts in thus freeing estates from the clogs intended to be put upon alienation; and they secured the passage of the statute, the preamble of which recited that "where one giveth land to another, and

the heirs of his body, it seemed very hard to the grantors and their heirs that their will expressed in their grant should not be observed; instead of which, after issue born, the grantee had power to alien his land contrary to the mind of the giver, and contrary to the form of the gift."

The statute substantially enacted that the will of the donor should be observed; that the land should revert, if such issue should fail (in that there was no issue at all), or if any issue be and fail by death, or if the heirs of the body of such issue should fail; that the donee should not have power to alien the land, but it should remain to his issue, or revert if issue fail. The statute was understood as confirming the estate to the issue of the donee until such issue should fail, and there could be no reversion so long as the issue of the donee had issue; but whenever that issue failed, be it in the tenth generation, or further on, then the estate reverted. Hence *failure of issue*, and *dying without issue*, might well be understood as meaning not only a failure of the donee to have issue, but a failure of the issue of such issue, at any period of time, or an indefinite failure of issue; and such was the construction.

Patterson vs. Ellis, 11 Wendell 260, 278;
Roberts' Digest 202.

Justices Tilghman, Yeates, Smith and Brackenridge, composing the supreme court of Pennsylvania, in their report upon the British statutes in force in Pennsylvania, made in 1808 to the Legislature of Pennsylvania, stated that the statute *de donis conditionalibus* is in force in Pennsylvania, except each part thereof as has been altered by the two statutes in Pennsylvania, the one providing for barring estates tail, and the other providing for facilitating the barring of entails.

Roberts' Digest (2d Ed.) XXII, XXIII, 202.

If the statute did not introduce, it at least established estates tail. It was applicable to conditional gifts and ordained that "*the will of the giver, according to the form in the deed of gift, manifestly expressed, shall be observed.*" By construction of the statute, it was held that in case the donee never had issue, or the issue failed, the land reverted to the donor. If the contention of the plaintiffs herein is correct, the failure of issue was a definite one; if the contention of the defendants is correct the failure of issue was an indefinite one. The difference, therefore, is when did the testator contemplate the failure of issue to occur?

In either aspect of the case, it seems that the statute *de donis* should apply, and if Amanda either never had issue, or the issue failed, either at a definite or indefinite period of time, the limitation over became operative. If a definite failure of issue the limitation would over be good; if an indefinite failure of issue, the estate created was a fee tail, and the limitation over was destroyed when the entail was barred.

The contention of the plaintiffs always has been that the estate of Amanda was such a one as was to become absolute, or be defeated, *at* her death.

Therefore, it could make no difference what issue existed during her life-time, if there was a failure of issue at the time of her death. Defendants have produced no authority to show that the having of issue in any case, where the language of the will is what Stevenson used, has been considered as making absolute the estate. That there is no such authority the cases cited by plaintiffs incontestably prove.

Plaintiffs do not contend that the case of *Eichelberger vs. Barnitz*, 9 Watts 447, has been overruled. On the contrary it is good law, and has been followed in numerous

cases in Pennsylvania. It has no application to this case, because in it there was no indication of an intention to restrict the failure of issue to the death of the first taker.

We, therefore, respectfully submit that we have established the following propositions, viz :

1. The answer to the first question, propounded by the United States Circuit Court of Appeals, should be in the negative.

2. That by the expression "*dying without offspring*," the testator meant death without *leaving* offspring, and the birth of offspring did not make absolute the estate of Amanda.

3. That under the language of the will and the facts under which it was first published, the testator did not contemplate the death of Amanda before his own death, and the gift over upon such death to be merely to prevent lapse of her devise.

4. That testator contemplated a definite failure of the offspring of Amanda, and, therefore, the gift over to the plaintiffs became effective.

5. That testator did not contemplate an indefinite failure of issue.

All of which is respectfully submitted.

S. Duffield Mitchell,
John S. Ferguson,
Attorneys for Plaintiffs in Error.

Pittsburgh, Pa.,
May 14, 1896.

IN THE

Supreme Court of the United States.

SAMUEL WHITEHILL BARBER, ET AL.
VERSUS
PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY, ET AL.

No. 431 October Term, 1896.

MOTION AND ARGUMENT FOR REHEARING.

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No. 431 October Term, 1896.

To the Honorable, the Justices of the Supreme Court of the United States:

Samuel Whitehill Barber and others, plaintiffs in error in the above stated cause, respectfully present their petition for rehearing upon the second question certified to this honorable Court by the United States Circuit Court of Appeals for the Third Circuit, and submit the following reasons why their prayer should be granted.

It is confidently urged by plaintiffs in error that that portion of the opinion of Mr. Justice Gray, in answer to the second question aforesaid, holding that "Amanda Stephens took an estate tail under the devise to her," is neither required by the application of the technical rules of the cases cited, nor consonant with the intent of the testator manifested by the general scope of the will.

It is suggested:

FIRST. That the Middleswarth will contained no provision whatever that in case of Jonathan's death "without leaving any legitimate issue" the land was *to be sold by the testator's executors*, as is contended by Mr. Justice Gray.

SECOND. That the cases of *Vaughan vs. Dickes*, *Matlack vs. Roberts and McCullough vs. Fenton*, do not establish the law in Pennsylvania to be that whenever a devise over is, upon death *unmarried* and without issue, the devise is read as simply upon death without issue.

THIRD. That there is sufficient in the will to show indubitably that testator meant by "*heirs*," the *children*, of John Barber, and a court of construction must so interpret the expression "*heirs of John Borber*."

FOURTH. That should the Court be correct in its construction of the will, in the particulars above suggestad, still the will abundantly shows that testator contemplated the failure of Amanda's issue *at* her death, and the gift over of the legacies to persons recognized by testator to be alive at the date of his will and his death.

By reason of this manifest intent, and in accordance with unquestioned prescedents, there can be no doubt that Amanda took a defeasible fee, with an executory gift over to the children of John Barber.

We can establish the above four propositions by the argument, attached hereto, made as brief as is consistent with the importance of this case, and we ask careful consideration thereof by the Justices of this Court.

Besides, the case is of such importance that an oral argument should be had. Plaintiffs in error admit that they voluntarily accepted the order of the Court that the case would not be advanced for oral argument, but would be advanced for submission upon briefs. They assume any blame which may result from the acceptance of this order, but they nevertheless submit that the intricacies of the case and the magnitude of the interests involved are such that an oral argument should be had.

Your petitioners respectfully pray that this cause be restored to the docket and a reargument be ordered upon the second question certified to this honorable Court by the

United States Circuit Court of Appeals for the Third Circuit.

The undersigned, members of the bar of this honorable Court, humbly conceive that it is proper that the question above suggested should be reheard by this Court, and they therefore respectfully certify that this petition is presented in good faith, and believe that it is based on meritorious grounds.

S. DUFFIELD MITCHELL,
JOHN S. FERGUSON,
Counsel for Plaintiffs in Error.

Pittsburgh, Pa., March 27, 1897.

ARGUMENT.

We call attention to the case of

Abbott vs. Essex, 18 Howard 202, and the opinion of Mr. Justice Grier, from pages 213 to 216.

The cases cited therein of

Pells vs. Brown, Cro. Jac. 590;
Porter vs. Bradley, 3 Durn. & East 143;
Roe vs. Jeffery, 7 T. R. 589;

have been followed by the Pennsylvania courts.

3 Yeates 221; 7 W. & S. 98; 24 Pa. 172; 57 Pa. 387; 155 Pa. 634.

Had testator inserted after the words "dying without offspring by her husband" the words "*living at the time of her death*," no one could doubt that the failure of issue would be a definite one, and the estate of Amanda would have determined on her death.

Eichelberger vs. Barnitz, 9 Watts 450;
Taylor vs. Taylor, 63 Pa. 485;
Middleswarth vs. Blackmore, 74 Pa. 415.

The other clauses of the will, mentioned hereinafter, fully supply the omission of these words, "*living at the time*

of her death," and show that to have been the intention and meaning of the testator.

The nature of the devise over has always been considered in determining whether a definite or indefinite failure of issue was intended.

Fahrney vs. Holsinger, 65 Pa. 392.

First.

A. It may well be that a direction to sell upon the expiration of an estate tail is not within the rule against perpetuities.

But it is submitted that the question whether a man *can* make a devise over after an indefinite failure of issue is one of *power*, and whether a devise over *is* of that character or not, is a question of *intention*.

The case of *Heasman vs. Pearse*, L. R. 7 Ch. 275, cited by Mr. Justice Gray, was a question of *power:* the question of testator's intention did not arise therein because testator devised real estate to trustees in fee to the use of his children in tail, and in default of such issue to the use of his granddaughter for life, with remainder to her children in tail, and in default of such issue to the use of the trustees in fee, in trust to sell and divide the moneys arising from the sale into three equal parts or shares. Here was a clear entail, and after its expiration the question was whether the sale was too remote.

Had James S. Stevenson created a fee tail in Amanda by the use of apt words, then the question whether the direction to sell at the expiration of the estate tail was valid, would have been a question of *power;* but in the case at bar it is a question of *intention*, whether Stevenson, not having used apt words to create an entail, intended the sale to occur at such indefinite period, or whether, having directed a sale and division of the proceeds, he did not contemplate the probability of the sale and division at the date of Amanda's death.

The question in *Heasman vs. Pearse* being one purely of *power*, and the application of the principle in *Cresson vs. Ferree* being *arguendo* merely and not decisive of the point, how can those cases, cited by Mr. Justice Gray, be authority upon the question at issue here, or how can they assist in exploring the intention of James S. Stevenson?

B. In endeavoring to distinguish the Stevenson will from the Middleswarth will, Mr. Justice Gray asserts that there was an express direction to the *executors* to sell the land in *Middleswarth vs. Blackmore*, 74 Pa. 414, and the inference, therefore, was that a *personal trust* was imposed upon the executors there, and not imposed upon them in the case at bar.

After a devise in fee to Jonathan that will directed

> "That in case * * * Jonathan should die without leaving any legitimate issue, then * * * the real estate * * * **shall be sold,** and after the payment of all the specified sums hereinbefore mentioned, which is enjoined on him to pay, then * * * of the balance remaining $1,000 shall be paid by my executors, or the surviving ones of them, to the Foreign Missionary Society, &c., * * * and the balance remaining * * * to be equally divided amongst all my legitimate grandchildren."

That the testator did not expressly authorize the executors to sell and that they could not sell without an order of the Orphans' Court, are propositions too evident for argument. To this extent the Middleswarth will and the Stevenson will are exactly alike.

Why does the direction in the former will that "$1,000 shall be paid by my executors, or the surviving ones of them," etc. raise a stronger implication of a *sale* by executors than in the latter will ordering "*lots * * to be sold*"; "the remainder of my property *to be sold;*" the proceeds from the sale of lots "*to be divided;*" and the remainder "*to*

be divided;" and the final appointment of executors? Of course, both Middleswarth and Stevenson counted as probable that their executors would make the sales and divide the proceeds according to the directions of their wills.

Although in the Middleswarth will, it was merely said that the land "*shall be sold*," yet both Justice Mercur and Justice Green treated this *bare direction* to sell as a positive direction to the *executors* to make the sale. For the latter said:

> "In *Middleswarth's Admr. vs. Blackmore*, the devise was to Jonathan absolutely of certain real estate, with a direction that if he died without leaving any legitimate issue, the property was to be sold by the executors and the proceeds to be given partly in charity and partly to the testator's legitimate grandchildren, by his children who had been previously named. We held, reversing the court below, that the direction to the executors to sell, and to pay the proceeds to grandchildren, whose parents were previously named in the will, were sufficient evidence that an indefinite failure of issue was not intended. Speaking of the direction of executors to sell, we said: 'It manifestly indicates that this failure will occur during the lifetime of some one of the executors named.' As to the bequest of the proceeds, we said 'all the authorities concur in saying that the devise over should be considered in determining whether the estate should vest on the death of the first taker. In distributing the proceeds of the land in which his wife had a limited use, he gave the names of the several parents of his grandchildren who were to take; thus fixing beyond any question that the recipients should be no further removed from him. In the latter distribution, he does not necessarily repeat the names of the parents of his grandchildren but evidently had the same persons in view. Thisex-' cludes the idea that the issue of Jonathan had reference to some remote period of the future."
>
> *Snyder's Appeal*, 95 Pa. 174, 181.

Taking the Middleswarth *will* alone, there is no doubt that the direction to *sell* the land at the death of Jonathan without issue, and the bequest of the proceeds of sale among a class of beneficiaries ascertained at the death of testator, were the controlling features which moved the Court to hold the failure of issue to be definite. The other indications, mentioned by Mr. Justice Gray, were regarded as merely *ancillary* (denominated by Justice Mercur as "*further*" and "*again*": 74 Pa. 420) to manifesting this intention, already shown by the direction to sell and to divide.

The case of *In-re Chisholm*, infra part four, section A, is one where these two directions, without more, were regarded as amply sufficient to restrict the failure of issue.

We refer to pages 65 to 75 of plaintiff's in error brief and to pages 13 to 22 of their reply brief.

In *Smith vs. Folwell*, 1 Binney 546, in case of death without issue, testator directed A. Y., his executors or administrators to sell and divide the proceeds among brothers and sisters. The case was decided on other grounds, but Chief Justice Tilghman said at page 558 that he would feel inclined to give as much weight to the direction to the executors of A. Y. to sell, as it would reasonably bear;

> "because it would tend to favor the brothers and sisters of the testator, who next to his son, were the objects of his affection."

This Court followed the construction of the above will in *Daly vs. James*, 8 Wheaton 495.

Chief Justice Tilghman, as a constructionist of wills, has left enduring monuments in the law of Pennsylvania.

That John Barber and "the heirs of John Barber" were very favored objects of James S. Stevenson's affection the will abundantly shows:—

a. To John Barber were devised two lots and one-eighth of the remainder; and he was appointed executor.

b. To "the heirs of John Barber" were devised the four lots at Amanda's death without offspring, and one-eighth of the remainder.

Then why is it not incumbent upon the Court to give as much weight to the direction to *sell* the lots, and the direction to divide the proceeds of sale among the "heirs of John Barber," as they will reasonably bear, because it tends to favor the children of John Barber, who next to Amanda Stephens, were the objects of his affection?

What possible benefit are the proceeds of sale to them, after the failure of an estate tail; when the entail may be barred and their benefit destroyed; and when their benefit depends entirely upon the whim of Amanda?

Second.

It is not the unbending rule in Pennsylvania that a devise over upon the contingencies, mentioned in the Stevenson will, is simply a devise upon death "*without issue.*"

The cases of

Vaughan vs. Dickes,

Matlack vs Roberts and

McCullough vs. Fenton,

lead to no such conclusion.

Examine those cases with care.

In *Vaughan vs. Dickes* the devise, after an estate to his wife for life, was to testator's children, Peter and Catharine, "*to them and their heirs for ever, share and share alike equally to be divided between them.*" The will then provided for the choice of three persons, who should "*equally divide the said real estate between them, share and share alike;*" and "should * * Peter * * *not marry and have lawful issue,*" then over to Catharine in fee simple.

There was no limitation over of Catharine's share.

Said Justice Woodward:—

> "His will shows his intention to divide his estate equally between Peter and Catharine, and as Peter was unmarried and childless, but Catharine was married

and had children, the idea in his mind evidently was, that if Peter should die without issue, his share of the estate should go to Catharine and her issue. We do no violence to either the language or the intention of the testator by reading the clause in this wise."

So the Court gave effect to the strong intent of the testator, viz: *equal division of his estate*,—by disencumbering the sentence of the *marriage condition*, and holding that Peter took an estate tail. The Court could not apply the substitutionary rule, because the life estate to the widow prevented that construction. Had the Court held that Peter had but a defeasible fee, then upon his death unmarried and without issue, Catharine would have taken his share in fee, and would have been seized of all the land. The only alternative, therefore, was to hold that Peter had a fee tail, which he could bar by the proper deed. In this way alone could a division, *share and share alike*, be effected by the Court.

That *Vaughan vs. Dickes* is not a rule to support the principle contended for in the opinion of this Court is most evident.

In *Matlack vs. Roberts* testator devised land to two sons, charged with legacies to his four daughters, and "in case of the death of either of my children unmarried or without issue," then the share of the child so dying equally to be divided among the surviving daughters.

How did the question of construction arise in this case? These are briefly the facts:

After the death of testator his land was sold on a judgment recovered in his lifetime. The proceeds of sale were applied by an auditor upon distribution:

(*a*) to payment of the debts of testator;

(*b*) to pay the legacies to the daughters, charged on the land;

(c) the balance of one son's share was absorbed by his debts; and *the balance of the other son's share was paid to him*, who subsequently died unmarried and without issue, having given all his estate to the defendant, who was also his executor.

The plaintiff was the son of one of the testator's daughters, and afterwards sued defendant to recover a portion of his mother's share, averring that she, as the daughter of testator, had a remainder after the entail, given to the son of testator, and that defendant was by law liable to pay.

The Court held that defendant was not liable.

It will be noticed that the decree of distribution by the auditor was never appealed from. The statute required the proceeds of sale by the sheriff to be paid to testator's executors, who would have distributed them as *real estate*; this was not done. The Court said that the sheriff's sale had accomplished what a deed to bar the entail would have done. See 54 Pa. at page 151.

Said Justice Agnew, at page 152:

> "Having the power to retain the estate by barring the entail and the means of so doing by the conversion and the possession of the money, how can it be said that a duty to pay has ever arisen, without security being required by the Court, or the exercise of his own option by a provision to secure the contingent devisees? The fund itself cannot be followed, for its identity was never preserved.
>
> An investment of the fund by John Roberts for the benefit of the contingent devisees might have given some means of following it. But here the money was encumbered by no condition imposed on its payment, and was not preserved by his own act, but has passed into his common estate, and he was bound by no duty to keep it. It is impossible, therefore, to imply a promise to pay it at his death to others who had no right and no power to restrain him from barring their contingent interests.

To this is to be added that the policy of the law does not favor inheritable interests in chattels or their being limited over to wait an indefinite failure of issue."

We most confidently urge that even had it been considered that John Roberts took a defeasible fee with an executory devise over to the daughters, nevertheless the *judgment* of the court in this case must have been the same, because the money was paid to John Roberts without security, and having become part of his common estate the fund could not be followed, for its identity was lost.

How can *Matlack vs. Roberts*, therefore, be an authority for this case?

In *McCullough vs. Fenton* the will used language showing that certain sons were to take absolute estates in land upon reaching the age of twenty-two; and if they should die before that age, then over to daughters; and if any of the daughters "should die without lawful issue or not being married," then over to next of kin.

At page 426, Mr. Justice Sharswood said:

> "*If the construction which reduces the estate of the daughters to an estate tail be adopted, then we have the original shares in tail, and the accrued shares in fee; an anomally which has been considered as inadmissible, and not within any reasonable construction of the intention.*"

Caldwell vs. Skilton, 16 Pa. 155, was followed and applied as decisive of the question. This case is cited by Mr. Justice Gray in his opinion, in answer to the first question.

Justice Sharswood at page 426 seemingly admitted the rule of *Vaughan vs. Dickes* and *Matlack vs. Roberts*, and said at page 427:

> "In that view the sentence is to be disencumbered of the marriage condition. If there was no marriage there could be no lawful issue, and as to

> the interest of husband and wife, it mattered not; for there is dower and curtesy of an estate tail, as well as of a fee simple. But the rule is an established one to give effect to every word, when it can be done, and these words ought not to be rejected if they indicate that the intention of the testator was not an indefinite failure of issue or an estate tail, but a substituted or alternative fee. Now, in this latter view they are important and very significant. If Hannah had died before Elijah, "being married," she would have left a husbund, and it was not the intention of the testator to deprive him of his curtesy, or to deny to Hannah in that event the power to provide for him by will. These words were necessary in that case, though they would have been insignificant and useless had an indefinite failure of issue been contemplated. * * * * * These words show, then, that the testator had reference to a definite, fixed period of time; and that could only have been the event of the death of a daughter before taking her substituted estate upon the death of one or both his sons before Elijah arrived at twenty-two."

The Court applied the case of

Doe d. Everett vs. Cooke, 7 East 269.

Baldwin vs. Rawding, 2 B. & Ald. 441, which hold that *unmarried* may mean, *not leaving a husband*, or wife.

It is plain, therefore, that the reasonable effect of these cases is as follows:

In *Vaughan vs. Dickes* the words "*not marry*," were treated as unimportant, because the paramount intent of the testator to effect *equal division* could not be effectuated, if they were allowed to control in the construction of the will.

In *Matlack vs. Roberts* the Court read the word "*unmarried*" out of the will, but it is submitted that the Court's *judgment* would not have been different had this not been done, and had the Court given full effect to it.

In *McCullough vs. Fenton*, the Court avoided the necessity of discarding the words, "*not being married*," by applying the substitutionary rule, and said that in "*this latter view they are important and very significant.*"

In *Matlack vs. Roberts* and *McCullough vs. Fenton* was not the Court's declaration as to the effect of the marriage condition mere *obiter dicta?*

In the last case was the latest utterance of the Court upon the permissibility of discarding such words from the will:

> "But the rule is an established one to give effect to every word, when it can be done, and these words ought not to be rejected if they indicate that the intention of the testator was not an indefinite failure of issue or an estate tail, but a substituted or alternative fee."
>
> And, again: "These words show * * that the testator had reference to a definite, fixed period of time."

This is contrary to the dictum of *Eichelberger vs. Barnitz*, and the ruling in *Rapp vs. Rapp*, 6 Pa. 45, which latter case, never regarded as overruled, has been cited in subsequent reports to *Vaughan vs. Dickes*, and the other cases.

The court in *Rapp vs. Rapp* said at page 50 that the testator:—

> "Made ample provision for his widow. Then his real estate to be put to rent until his youngest child attained to lawful age, when it should be appraised, accepted or sold; the whole to be equally divided. Then came the clause 'that in case any of the children should die unmarried and without lawful issue, the share or portion of him or her so dying should revert back to

the survivors, share and share alike.' This is good as an executory devise and is not too remote."

In Pennsylvania the cases of
Deihl vs. King, 6 S. & R. 29, and
Kelso vs. Dickey, 7 W. & S. 279,
have established the rule that a bequest over upon death unmarried and without issue is upon a definite failure of issue and is not too remote.

And the general rule respecting both real and personal estate is to the same effect.
3 Jarman on Wills, (Ed. 81) 309;
Downing vs. Wherrin, 19 N. Hamp. 9;
Jones vs. Sothoron, 10 Gill & J. (Md.) 187;
Wilson vs. Bailey, 3 Bro. P. C. 195, and
Johnson vs. Johnson, 8 Ex. 81.

In the Stevenson will the words are:

"In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband," &c.

The testator thus distinctly provides for:

(1) The unmarried condition; and
(2) The married condition.

The testator's meaning in providing these two contingencies was that:—

(1) "In the event of Amanda dying unmarried then these lots are to be sold," &c.; and
(2) "In the event of Amanda, if married, dying without offspring by her husband, then these lots are to be sold," &c.

The intention clearly is that upon the happening of either the one contingency or the other contingency the sale should be made and the proceeds of sale divided. No technical rule can override such intention, much less can the rule established by such cases as *Vaughan vs. Dickes*, *Matlack vs. Roberts*, and *McCullough vs. Fenton*.

A scrutinizing examination of those cases irresistibly leads to the conclusion that there is no settled rule of property in Pennsylvania by which the devise over "in the event of Amanda dying unmarried, or, if married, dying without offspring by her husband," is equivalent to simply "dying without issue."

The will in controversy might possibly be like those construed in *Vaughan vs. Dickes*, *Matlack vs. Roberts* and *McCullough vs. Fenton*, if the first clause, viz: "dying unmarried," were omitted, but that clause marks a radical distinction between those cases and the one now before the Court.

The express direction in the Stevenson will is that the devise over shall take effect (1.) whether there is no marriage; or (2.) whether there is marriage, if there be no offspring by her husband.

The *married* condition is thus provided for:

> "In the event of Amanda, * * * if married, dying without offspring," &c.

So in the words of *Vaughan vs. Dickes*:

"As Amanda could not have lawful issue unless she married, we may disencumber the sentence of the marriage condition," and thus read the devise:

> "*In the event of Amanda * * dying without offspring by her husband.*"

Now to this extent the cases are claimed to go;—no further.

Supplying then the words, held back for the purpose of the above demonstration, we have the sentence in its complete and final form, and certainly in the only form which exactly fulfils the testator's meaning, viz:

> "In the event of Amanda dying unmarried or dying without offspring," &c.

We then have two distinct contingencies, upon which the gift over is to become effective:

(1) dying unmarried; and

(2) dying without offspring.

To emphasize those distinct contingencies, the testator makes the word, "dying," introduce each contingency.

Why should a rule, which has received the severe criticism, imposed upon *Vaughan vs. Dickes*, whenever the Courts have been asked to apply it (plaintiff's brief, pages 81 to 84) be pushed far beyond its reasonable scope, in construing this will?

To apply that case as it has been here applied, strikes from the will of James Stevenson the words "*dying unmarried, or, if married * * * by her husband.*"

This is done directly in the face of the rule that "all mere technical rules of construction must give way to the plainly expressed intention of a testator."

Reck's Appeal, 78 Pa. 432, 435.

If this last rule is to be applied, then the supposed rule of *Vaughan vs. Dickes* must give way to the plainly expressed intention of the testator. If *Vaughan vs. Dickes* rules this case, the testator in his effort to be unequivocal, has said too much; he should have restrained himself by limiting the devise over upon Amanda dying *unmarried;* and should have said nothing about death *married without offspring*, because more than twenty years after his death the courts declare that testators cannot engage in such efforts at perspicuity.

Suppose the words of the will had been:—

"*In the event of Amanda dying unmarried, then the said lots are to be sold,*" &c.

The law unquestionably is, that upon death *unmarried*, the gift over to the Barber heirs would have taken effect, and the estate of Amanda been determined.

Jessup vs. Smuck, 16 Pa. 327.

But the testator was intelligent enough to know that Amanda might marry and have children; and he desired to provide against the contingency of death without children; had he intended her to take a fee simple upon death *married* he would have said nothing more.

What is the intention to be gathered from the second condition proposed by the testator, viz:—

> "*or, if married dying without offspring by her husband?*"

Did he anticipate that a court of construction should say: "The words '*unmarried*,' '*married*' and '*by her husband*' are surplusage; the testator not meaning what he says, these words must be disregarded."

What authority is there for disregarding the words "*by her husband*," descriptive of offspring?

Vaughan vs. Dickes does not require it. No case authorizes it. "*By her husband*" cannot reasonably import legitimacy, because under the rule of *Vaughan vs. Dickes*, "married" imports that. "*By her husband*" cannot create a fee tail special, because it does not confine the estate to the issue of one husband and exclude that of another.

Grandchildren would not be "offspring by her husband." Therefore, that phrase must confine the issue to the degree of descendants of Amanda, begotten by her husband, *i. e. her lawful children.* This of itself restricts the failure to a definite period. It is no answer to plaintiffs to say, What was the testator's intention if Amanda should die leaving no children, but grandchildren? Courts in such cases hold grandchildren to be included in the term children. If our contention be correct, the testator intended

Amanda to take a fee simple, to become absolute upon death leaving children or other descendants of a definite degree; and to be defeated upon her death not leaving such descendants.

The only case upon the briefs of either party in this case, directly in point, is in favor of the plaintiffs. It is a well considered case, and should rule here. The devise was to testator's wife for life, with remainder to his nephew, Samuel, and his heirs, but in case his nephew should die before he attained the age of twenty-one, or, after he should have attained such age of twenty-one, should die unmarried, or having been married, should die without lawful issue, then over. *Held* that the nephew took an estate in fee, with an executory devise over on the happening of any of the three specified events, and that the last event was his death without leaving issue surviving him.

Baron Martin said:

> "The estate expressly devised to him was an estate in fee simple, 'to him and his heirs forever.' Then there came a proviso, first, if he should die under twenty-one; secondly, if he should die after twenty-one unmarried; thirdly, if he should die, having been married, without lawful issue.
>
> Now the first two events directly point to the period of his death; and we think it would be a very forced construction of the devise to hold that the third event pointed, not to his death without leaving issue then living, but to the failure of issue of his body at any period, however remote. The same words 'shall die' are in the devise directed to both events, viz: 'being unmarried' and 'without lawful issue,' and we think that it was the state of things existing at Samuel's death, which was to determine whether the future estate was to come into enjoyment or not."

Johnson vs. Johnson, 8 Ex. 81.

Finally it may be asked why the *intention* of testator was considered to be more marked in favor of a definite failure of issue where the gift over was upon the death of the first taker *in her minority and without lawful issue then living:*" *Britton vs. Thornton*, 112 U. S. 526; than it is marked where the gift over is upon "*dying unmarried, or, if married, dying without offspring by her husband?*"

And in answering the first question certified why does this court consider as important the words *unmarried* and *married*, and in answering the second question hold that they are of no importance?

And this, too, when expounding the intention of testator as gathered from exactly the same words of the will in reference to both questions certified?

Third.

Can it be questioned that by "*heirs*" the testator meant the *children* of John Barber?

True, the word "*heirs*" is "not limited, in its own meaning," when standing alone, or not associated with a context, showing its use in a secondary meaning.

But it is so limited by this will:—

(1) By recognizing in four ways John Barber to be alive:

(*a*) by devising two lots to him;
(*b*) by bequeathing an eighth of the residue to him;
(*c*) by appointing him an executor; and
(*d*) by describing him "*of Columbia, Penna.*"

(2) By recognizing the "*heirs of John Barber*" to be a determinate class of persons in being by bequeathing to them a portion of the residue of his estate.

Under the authorities cited in part four, section C, of this argument, it is the unbending rule to define *heirs* as *children* of John Barber because the court cannot

> "*put a different* construction on the same word where it occurs twice or oftener in the same instrument."

Therefore, in the devise over after the death of Amanda the words "heirs of John Barber" were used as *designatio personarum*, and was to the *children*.

The devise to this class of persons took effect in favor of those who constituted the class, at the death of the testator.

Middleswarth's Estate, 87 Pa. 362, which arose from *Middleswarth vs. Blackmore*, 74 Pa. 414.

So in *Etter's Estate*, 23 Pa. 381, where there was a devise for life, remainder to lawful issue, but if devisee die without such issue then to be sold and proceeds divided among surviving heirs of testator.

Justice Lowrie said, at page 383, whether the devise gave an estate tail or life estate, "in either way * * * the other devisees or legatees had a vested estate at the moment of the testator's death."

This will directs "the proceeds to be divided equally among the heirs of John Barber, of Columbia, Penna."

The direction to divide *among* such heirs is sufficient to create a tenancy in common; but in addition we have the word

"*equally*."

This "shows an evident intention to put all upon the same platform of ownership, which would carry a vested interest in all."

Mull vs. Mull, 81 Pa. 393, 394.

It follows that the persons who are to take the proceeds of sale are ascertained at the death of the testator. These ascertained individuals are deemed to be the objects of the bequest, although described only as the "*heirs*" of an ancestor still alive.

That he contemplated the division of proceeds among the *children* of John Barber is apparent, because the division must be *equally* made; and the division could not be equal if made among the members of different degrees of descendants of John Barber.

In addition to the authorities cited upon pages 75 to 78 in plaintiff's brief, we call attention to the following cases, which hold that under like language *heirs* means not heirs of John Barber, if he be dead, or heirs apparent if he be living, but his *children*.

In *Vannorsdall vs. Van Deventer*, 51 Barbour 137, there was a devise of all testator's real estate to his wife for life, and at her death to the "legal heirs" of a brother, deceased; to the "legal heirs" of a sister, deceased; and to the "heirs" of a brother-in-law, who survived the testator and the widow.

The brother-in-law was alive at the date of this suit, and the widow was then deceased.

Said Justice Smith at page 146:

> "The word *heirs*, as used in this will, so far as relates to the heirs of his brother-in-law, Van Deventer, was doubtless used as synonymous with the word *children*, for the will assumes that he was then living, while in respect to his brother, Abram, and his sister, Maria Snyder, it speaks of them as deceased. In respect to the heirs of his brother and sister there was no contingency in respect to the persons to take, and the estate would vest immediately upon the decease of the testator. Assuming that the testator meant to give the third interest in the estate to the children of his brother-in-law, Van Deventer, there could be no contingency at the time of the death, and the estate would vest in the children of the defendant, Van Deventer, then living, immediately."

To the same effect are:

Campbell vs. Rawdon, 18 N. Y. 418;

Cushman vs. Horton, 59 N. Y. 149; and

Simms vs. Garrott, 1 D. & B. Eq. 393.

Fourth.

Plaintiffs contend that the will, taken as a whole, evinces a clear intent that the failure of Amanda's issue shall be definite, and that *upon* such death without issue the gift over to the Barber heirs shall take effect.

This Court in answer to the first question held that by the primary devise, Amanda took a fee simple title in the lots, according to the settled law of Pennsylvania.

The rule in that case is thus stated:

> "Where the preceding devisee would take the fee, the convenience is all on the side of the restricted construction which renders such fee defeasible on his not leaving issue at his death, and places the estate out of the power of the first taker, who might, if he were tenant in tail, (as he would be if the words were construed to mean an indefinite failure of issue) defeat the ulterior estate. *To prevent this consequence, the courts have generally, in such cases, lent a willing ear to the arguments in favor of the restricted (and which we have seen to be the popular) interpretation of these words.*

On the other hand, where the first devise would confer an estate for life only, the restricted construction imputes a very improbable intention to the testator; for as it raises no estate tail in the first devisee, nor (it should seem) an implied estate by purchase in the issue, the land goes absolutely from the devisee at his death whether he leave issue or not."

3 Jarman on Wills (Ed. 81) 323.

And accordingly in *Parker vs. Birks*, 1 Kay & Jones 156, 166, Vice Chancellor Sir W. P. Wood thus states the rule:

> "In no case in which an estate in fee simple has been limited by the first words has that estate been reduced to an estate tail in order to construe the words of the gift over on the death of the devisee without issue to be a remainder. It is begging the question to say that the gift over is to be taken to be a remainder, be-

cause it is necessary first to make out that the gift in fee is cut down to an estate tail."

Testator contemplated the "heirs of John Barber," to take my way of executory devise, from the following provisions in the will, viz:

(*a.*) He gave a *personal benefit* to the children of John Barber, and not a transmissible interest.

(*b.*) He directed a sum of money to be paid at the death of Amanda without offspring.

(*c.*) He directed the sale to be made and the proceeds to be divided *at* the death of Amanda.

(**a.**) PERSONAL BENEFIT.

In *Greenwood vs. Verdon*, 1 Kay & Johnson 74, the question in the special case was whether the son took under the devise an estate tail, or an estate in fee simple, subject to be defeated by an executory devise over, under the devise of all the testator's real and personal estate to his wife for life and after her death to his son "*and to his heirs and assigns forever*" and "*from and after the decease of my said * * * son * * without issue*," then over "*to be equally divided amongst the then surviving legatees, share and share alike.*" *Held* to be a fee simple with executory devise over.

Vice Chancellor Sir William Page Wood said that there were several points upon this will, which did not admit of question:

1. The estate given to the son was clearly an estate in fee simple.

2. It was equally clear that, under the words, "dying without issue," unless there was something to restrain their meaning, the testator must be taken to have meant an indefinite failure of issue, and that the limitation to the son in fee would be thus cut down to an estate tail.

The Vice-Chancellor said that under the authorities he felt bound to construe the words "*the then surviving lega-*

tees" to mean those who may be surviving at the time of the failure of issue of the son; and therefore the case was reduced to the point whether or not there was sufficient on the face of the whole of this will to indicate a definite failure of the issue and not a general failure thereof; and he concluded that there was such indication.

At page 81, it was said:

> "There has been a series of authorities, from *Hughes vs. Sayer*, which has established the rule that when it is apparent on the face of the will that the testator intended to give a personal benefit to those to whom the estate is limited in default of issue, and not a transmissible interest, in such cases, the construction that an indefinite failure of issue was intended, is out of the question, because it could not be supposed that the testator could have intended to confer a personal benefit and yet to postpone it till after an indefinite failure of issue. Accordingly, Sir William Grant, in *Massey vs. Hudson*, conceives it to be settled, that where there is a limitation to one of two persons, and on the event of his death without issue, to the survivor of them, without more, the presumption is, that a personal benefit is intended to the one who survives, unless there are added the words, 'his executors, administrators, or assigns,' which would exclude that presumption. That last distinction seems very fine, but I suppose Sir W. Grant grounded it on this, that the addition of those words plainly imports that, instead of a personal gift, a transmissible interest was intended for the survivor. The argument in such a case, where the words, 'executors, administrators and assigns,' are not used, would be, that it is not natural to suppose that the testator intended a limitation over for the benefit of the survivor, after an indefinite failure of issue, by way of transmissible interest, because the gift over is to depend on the mere accident of survivorship; and it is unnatural, if the donor were regarding a distant period, that he should make the benefit to the representatives of the survivor depend on the contingency of their testator surviving the original donee; and, therefore, this

> form of limitation is held to be sufficient to modify the strong legal effect of the words 'dying without issue' so as to make them signify 'dying without leaving issue at the time of his death and leaving the other party surviving."

In *Re Chisholm*, 17 Grant's Ch. Rep. (Ontario) 403, the question was as to the construction of a will, in which there was a provision in favor of a granddaughter, as follows:—

"I direct that my granddaughter, upon her becoming married, shall have full possession of the aforesaid whole farm and premises; * * * and I further direct that in case of my granddaughter dying without issue or heir, the whole of the farm now in my possession * * shall be sold by my executors, and from the avails of such sale, and also from such other of my property that may be then remaining in their hands, I direct the following sums to be paid as further legacies," viz: (to persons named) the remainder to be applied for missionary purposes at their discretion.

Vice Chancellor Mowat said:

> "In *Greenwood vs. Verdon*, 1 K. & J. at 80, Lord Hatherley, then Vice Chancellor, stated the established rule to be, 'that when it is apparent on the face of the will that the testator intended to give a personal benefit to those to whom the estate is limited in default of issue, and not a transmissible interest; in such cases the construction that an indefinite failure of issue was intended is out of the question, because it could not be supposed that the testator could have intended to confer a personal benefit, and yet to postpone it until after an indefinite failure of issue.'"

Affirmed upon appeal: *Chisholm vs. Emory*, 18 Grant's Ch. Rep. 467.

Now it is well settled both in England and in Pennsylvania that a devise over to *survivors* in case of real estate does not restrict the failure of issue. So it must have been

the intent to give a *personal benefit* to the divisees over, which impelled the Court in

Greenwood vs. Verdon, and

Chisholm vs. Emery,

to restrict the failure of issue to a definite time.

The intention to confer a *personal benefit* upon the children of John Baker is as apparent as it was in the *Chisholm* case just cited. The land was to be sold and they were to receive it as *personal* property. As personal property it was susceptible of *division*, and as the division was to be *equal* he certainly contemplated the actual enjoyment by the children of John Barber, because they were to be living at the period of possession. And as they were living at testator's death and so recognized by him, the intention to confer a personal benefit was again shown.

The direction to sell and divide indicates a personal benefit.

It is plain that a transmissible interest was not given to the "heirs of John Barber," because there was no further limitation to their "executors, administrators or assigns."

What more was there in

Eby vs. Eby, 5 Pa. 461 and

Johnson vs. Currin, 10 Pa. 498 (the latter case being followed and approved in the *Middleswarth* case, 74 Pa. 420,) to show that a definite failure of issue was contemplated?

In *Eby vs. Eby* the devise was to a daughter in fee and "*if she should die without lawful issue, then said lands shall be divided among my other heirs.*" *Held* that the gift over was an executory devise. Why? Because the gift over was held to be to *children*, and not to more remote descendants, or other relatives, who might technically be embraced by the term *heirs*; and also because upon payment by the daughter of a certain sum for the land the *testator's* executors were to make a deed to her for the land. The Court said *Eichelberger vs. Barintz* did not apply.

In *Johnson vs. Currin* the devise was to a daughter in fee simple and if she should die "without heirs of her body" then to be equally divided between the surviving daughters and grandchildren. *Held*, to be an executory devise over, because it was limited over to persons *in esse*.

(**b.**) PAYMENT OF MONEY.

Where property is devised to a person and his heirs, with a limitation over of the same on failure of his issue, subject to the payment of a sum of money, to be disposed of by his will, such failure of issue is construed to be a failure of issue at his death.

Doe d. Smith vs. Webber, 1 Bar. & Ald. 713;

Smith on Ex. Int. 561.

The doctrine of the above citation from Smith and the case of *Doe vs. Webber* is law in Pennsylvania, and was expressly said to be so by Mr. Justice Sharswood in the leading case of *Fahrney vs. Holsinger*, 65 Pa. 388, at pages 392 and 393.

At the latter page it was said that the case of *Taylor vs. Taylor* (see plaintiff's brief, pages 69 and 70) falls "within the same principle."

Now, in *Fahrney vs. Holsinger* there was a devise in fee to Daniel and Susan, with devise over of Susan's share upon her death without heirs to Daniel, upon his paying a sum of money.

In this connection Justice Sharswood squarely ruled that a fee tail was not intended, and said, at page 392:

> "The reasons against such construction seem to be very cogent. The nature of the devise over has always been considered in determining whether a definite or an indefinite failure of issue was intended. The devise over in this instance was to take effect in Daniel's lifetime, for he was to do a personal act, namely, he was to pay or be charged for the share of Susanna in that event at the rate of $55 an acre; and this sum was to be divided equally between the testator's other

children or their legal heirs or representatives then living. *It is impossible to conceive that the testator could have contemplated in this devise over an indefinite failure of issue at any period, however remote: When the heirs or legal representatives of Daniel were to pay fifty-five dollars per acre for the land to be divided among the heirs or legal representatives of his other children. Had he intended it, it would undoubtedly be void as an executory devise, and to prevent that result the courts in such cases vest an estate tail in the first taker. But if it is clear that the testator had no eye to such a remote period, the construction of an indefinite failure of issue must be rejected.*"

Farney vs. Holsinger is cited upon our brief at pages 69 and 70.

It is clear that the above italicized language of Justice Sharswood is sufficiently comprehensive to furnish a rule for the Stevenson will to decide that the testator did not contemplate a fee tail estate in Amanda.

Adapting the Justice's language to the provisions of this will, we may say:

It is impossible to conceive that the testator could have contemplated in this devise over an indefinite failure of issue at any period however remote; when the legal representatives of testator were to pay the proceeds of sale of the land to and amongst the heirs of John Barber or to their legal representatives.

In *Theological Seminary vs. Cole*, 18 Barb. 360, there was a gift of the rest and residue of testator's estate, "both real and personal," unto his daughter, "her heirs and assigns forever; and if she should die without lawful issue, then I give and bequeath" to the Seminary the sum of $10,000 to be paid in four equal annual payments after the death of the daughter. *Held* that the bequest over was after a definite failure of issue.

Upon appeal this case was affirmed by the Court of Errors and Appeals and opinions delivered by Chief Justice Denio and Justice Paige.

Theological Seminary vs. Kellogg, 16 N. Y. 83.

In the above case the legatee over was a corporation, whose existence was perpetual, and after a devise in fee of the residue, both real and personal, there was a gift over of a legacy upon the first devisee's death "*without lawful issue:*" yet the court found sufficient in the will to make the failure of issue definite and supported the gift over. In this will there was nothing to show whether the above legacy was to come from the real or personal part of the residue.

(**c.**) Gift Over at Death.

In our brief, upon pages 88 to 95, we presented an argument upon this feature of the case, which certainly possesses merit; and which was ignored by the Court.

The whole phrase "in the event of" means *upon;* then we have:

1. Upon my decease (first clause of will);
2. Upon Amanda dying (third clause of will);
3. Upon her (Eliza's) death (fifth clause of will).

The phrase "*in the event of*" means *upon* in the first and third places above mentioned, if it means anything; the Court is, therefore, bound to construe it in the same way in the second place; it then exerts great force upon the construction of the devise over.

Event necessarily means a happening, and has reference particularly to *time.* This expression must be construed in the same way throughout; it has reference to the same subject matter in every clause—*death.* The condition of Amanda is described by the words "*unmarried, or, if married.*"

"In the event of" accompanies the word *dying:* in that sense, it can only mean *upon* or *at* the time of.

In *Rhodes vs. Rhodes*, 27 Beavan 413, Sir John Romilly, Master of the Rolls, applied the rule in the construction of the word "issue," and at page 417 said:

> "It is a canon of construction, that where a testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of his will, if it do not violate the sense."

In *Sibley vs. Perry*, 7 Ves. 522, where a testator gave a sum of £1,000 stock to each of several persons, if living at his decease, and if not, he directed that their lawful *issue* should take the £1,000 stock which their respective *parents*, if living, would have taken; and he made other bequests to the lawful issue, living at certain periods, of other persons: Lord Eldon thought it was clear, as to the former class, that children were intended, and that this was a ground for giving the word "issue" the same construction as the other bequests.

To the same effects is

Edwards vs. Edwards, 12 Beavan 97.

In *Ingersoll's Appeal*, 86 Pa. 240. Mr. Justice Sharswood gave full effect to this rule; at pages 245 and 246 he said:

> "It is undoubtedly true that if she had merely provided that on their death 'without issue or without leaving issue' the devise over should take effect, the law would have construed it to be an indefinite failure of issue, and their estate would thereby have been reduced to an estate tail. But the words 'dying without issue or without leaving issue' may always be shown by other parts of the will to have meant 'issue living' at the death of the first taker. * * * In the will before us these words are found three times in the same paragraph within a few lines of each other. In the first two they are evidently used in the sense of a definite failure of issue: 'Should either of them die without issue then the share of the deceased shall go—but still subject to this trust—to the survivor.' 'Should they, or either of

them, die leaving issue, then my trustee shall hold the estate so left for the uses which may be declared by them, or either of them, by last will and testament or writing in nature thereof.' It is very evident that in both these cases the testatrix could not have contemplated an indefinite failure of issue at some future period, however remote. When, therefore, she concludes her limitation with the same words 'should both of them die without issue' the inference is irresistible that she used the words in the same sense that she had done before."

And in *Clavering vs. Ellison*, 3 Drewry's Rep. 451, at page 472, the word *educated* was so construed when used several times in the will.

Now, as demonstrated by the above cases, the testator *has potentially* said:

"*Upon Amanda dying*," &c.,

therefore, the rule is that he has limited the failure of her issue to the time of her death, and the gift over must take effect as an executory devise.

This is the universal rule of construction, as the cases of *Doe vs. Frost*, *Ex parte Davies*, *Parker vs. Birks*, and *Coltsman vs. Coltsman*, fully set forth on pages 91 and 93 of plaintiff's brief attest.

Chief Justice Gilchrist, in *Downing vs. Wherrin* (See plaintiff's brief at page 84), gave full effect to the same rule where the limitation over was *after* a son's death without issue.

This rule is not a technicality to defeat testator's intention, but rather a manifestation of what courts seize upon, even where there is nothing else in the will, to effectuate such intention and to avoid a meaningless rule, (i. e. fee tail from a devise over upon death without issue,) which is and should be more honored in the breach than in the observance.

Judge Ewing admitted that the words "*in the event*" referred in the case of the testator's and Eliza Stevenson's death, to "*what is to be done immediately upon the death,*" and did not deny that they had the same meaning in reference to "what was to be done in the contingency of Amanda's death" as "at and immediately after her death." He was wrong in the declaration that the presumption is against it; we have proven that the presumption is in favor of it; nor was he correct in saying that such supposed presumption against it was not overcome by the other clauses. Having established the meaning of "in the event of" to be *upon;* the devise over *upon* death overcomes all other clauses of the will indicative of a fee tail (if they so indicate) and makes the failure of issue definite.

Finally let us suggest that estates tail are neither favored by the common law, nor are now permitted to exist by statute; then why construe an estate to be an entail in order that it may be destroyed by the act of the party, or destroyed by law, in the face of the clear intent of the testator to give not an estate tail, but a defeasible fee with a good executory devise over?

James S. Stevenson intended the children of John Barber to have the proceeds of the sale of the lots in the event of Amanda

(1.) dying unmarried;

(2.) or, even if married, dying without offspring by her husband. That intention should be effectuated.